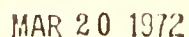


Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

3 I.A.³ 69



55032

ABST.

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

vs.

HENRY A. BROWN.

HONORABLE JAMES D. CROSSON,
Presiding.

Defendant-Appellant.)

MR. JUSTICE STAMOS delivered the opinion of the court.

After a bench trial defendant was found guilty of the offense of robbery and sentenced to the Illinois State Penitentiary for not less than one nor more than five years. He appeals and contends that the evidence was so conflicting as to raise a reasonable doubt of his guilt. Because of the nature of this contention it is necessary to summarize the testimony presented.

The victim of the robbery, Gene Smith, testified that on May 23, 1969 at approximately 7:20 P.M. he encountered the defendant at 43rd and Ellis Avenue in Chicago. The defendant asked Smith if he wanted to have a drink, received an affirmative response and purchased some liquor. Smith then accompanied the defendant, a man named Gamble and another man into a nearby alley. Smith testified that halfway into the alley he was grabbed by the defendant, who held him while the other two emptied his pockets. Smith heard the voice of a friend, Esau Washington, and called out for assistance. Washington and another man appeared almost immediately. The defendant released Smith and Gamble dropped a two by four which he was holding over Smith; the third assailant had already fled. Smith pulled a knife and cut Gamble on the cheek, but Washington prevailed upon him to desist and to seek police aid.

On cross-examination Smith asserted that he had nothing to drink in the alley or earlier that evening. Also, he said that he did not remember what caused Gamble to drop the board he was

BOUND... AUG 16 1973

holding.

Esau Washington testified that on the evening in question he saw Gene Smith enter an alley with defendant and two other men. After approximately one minute Washington became curious and proceeded with a friend to the same alley. Upon entering the alley he saw Smith and the defendant arguing and Gamble holding a two by four. Smith was demanding that the defendant return his money. Washington took the board away from Gamble and told Smith to call for the police.

The only other testimony in the trial was that of the defendant and that of two police officers who related two incriminating statements made by the defendant after his arrest.

The defendant argues that contradictions in the complainant's testimony and its inconsistency with the testimony of Washington are sufficient to raise a reasonable doubt of defendant's guilt. On cross-examination the complainant stated that at the time of the robbery he had not had anything to drink, but at the preliminary hearing he testified he was drinking that evening at 4301 Ellis. There were also inconsistencies as to whether the victim knew the defendant for two weeks or for two months, whether Gamble dropped the two by four or Washington grabbed it, whether the defendant and Smith were struggling or "arguing" and whether Smith ever touched the two by four during the robbery. We do not find these inconsistencies, when viewed against the entire record, to be of such magnitude as to raise a reasonable doubt of defendant's guilt. The testimony of the complainant and the corroborative testimony of Esau Washington, if believed by the trier of fact, and the evidence of two incriminating statements by the defendant following his arrest were adequate to justify his conviction.

JUDGMENT AFFIRMED.

LEIGHTON, P.J., and SCHWARTZ, J., concur.

(ABSTRACT ONLY)



3 I.A.³ 106

MAR 20 1972

No. 55195

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

JOHN W. MYERS,
Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE FRANCIS T. DELANEY,
PRESIDING.

ABST.

MR. JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal from the conviction of John W. Myers on two indictments for burglary and two indictments for theft of various property. The defendant plead guilty to all four indictments, was found guilty and was sentenced. On appeal defendant's counsel, the Public Defender of Cook County, filed a motion to withdraw and a brief in support of this motion contending that, in his opinion, an appeal would be without merit and could not possibly be successful, in compliance with the rules set out in Anders v. California (1967), 386 U.S. 738. Notice of that motion and copies of the petition and brief were mailed to defendant on July 14, 1971. Defendant has not responded.

On August 18, 1969, the defendant was arraigned on one indictment for burglary and two indictments for theft. At that time counsel was appointed and he entered a plea of not guilty to all charges. On August 28, 1969, defendant was arraigned on the fourth indictment and again plead not guilty.

On March 24, 1970, the four indictments were called for trial. On that date the defendant presented a pro se motion to dismiss one of the indictments for theft which was denied. The court was then informed that the defendant wished to change his plea to guilty to all charges in the four indictments.

Immediately afterwards the following colloquy took place:

MR. XINOS: Your Honor, Mr. Myers is going to withdraw his previously entered plea of not guilty to all of the indictments for which he is before this Court, specifically 69-2522, 2523, 2524, and 69-2653. Mr. Myers is going to enter a plea of guilty to all of the indictments. We are ready to proceed.

THE COURT: Proceed, Mr. State's Attorney.

MR. NEVILLE: I have no objection, your Honor,
to the pleas of not guilty being
withdrawn. I am ready to proceed also on a
plea of guilty.

THE COURT: Mr. Myers, you have heard the Public
Defender of Cook County, your attorney,
advise me that at this time you are withdrawing
your pleas of not guilty to these four indictments
and the various counts thereof, and you are at this
time pleading guilty to the four indictments and
the various counts thereof; is that correct, sir?

DEFENDANT MYERS: Yes, sir.

THE COURT: Do you know that when you plead guilty
you automatically waive your right to
a trial by me, anybody sitting in my place and stead,
twelve people in that jury box. In other words, you
get no trial whatsoever, you waive your right to any
trial under any one of these indictments or counts
thereof; do you understand that?

DEFENDANT MYERS: Yes, sir.

THE COURT: And knowing and understanding that,
do you still persist in your guilty
pleas to these four indictments and the various
counts thereof?

DEFENDANT MYERS: Yes.

THE COURT: Before accepting your pleas, it is
my duty to advise you that under your
plea of guilty, in Indictment 69-2522, charging
you with burglary; and in Indictment 69-2653,
charging you with burglary, I may sentence you
to the Illinois State Penitentiary for any term
of years not less than one and for as long as
the rest of your natural life, and I may make
them run consecutive so that if you made parole
or were pardoned on one, you would again start
to serve the other one immediately; do you under-
stand that? Sir?

DEFENDANT MYERS: Yes.

THE COURT: And knowing and understanding that,
you still persist in your pleas of
guilty on Indictment 69-2522 and 69-2653, both
of which charge you with burglary?

DEFENDANT MYERS: Yes, sir.

* * * * *

Mr. Myers, before accepting your plea of
guilty to 69-2523 and 69-2524, the first count
of each indictment charging you with theft of
property having a value in excess of One Hundred
and Fifty Dollars, and under your plea of guilty
to the first count of each of those indictments
charging you with theft of property having a
value in excess of One Hundred and Fifty Dollars,

I may sentence you to the Illinois State Penitentiary for any term of years of not less than one and not more than ten; do you understand that, sir?

DEFENDANT MYERS: Yes, sir.

THE COURT: And I may make these two run consecutive and consecutive also in the charges and the penalties under the burglary indictments; do you understand that, sir?

DEFENDANT MYERS: Yes, sir.

THE COURT: And knowing and understanding the penalties to which you are subjected under the first count of indictment 69-2523 and 2524, charging you with theft of property in each indictment, having a value in excess of One Hundred and Fifty Dollars, do you still persist in your guilty pleas to those two counts of those two indictments?

DEFENDANT MYERS: Yes, sir.

* * * * *

THE COURT: ***

Under the third count of indictment 69-2524, you are charged with theft of property having a value in excess of One Hundred and Fifty Dollars from George Koester, and you are pleading guilty to that, sir?

DEFENDANT MYERS: Yes, sir.

THE COURT: Do you know that when you plead guilty to that charge, you automatically waive your right to a trial by me, by anybody sitting in my place and stead, twelve men in that jury box; in other words you get no trial whatsoever; you will waive your right to a trial under the third count of that indictment; do you understand that, sir, --

DEFENDANT MYERS: Yes.

THE COURT: -- and understanding and knowing that, you still persist in your guilty plea --

DEFENDANT MYERS: Yes, sir.

THE COURT: -- under the third count of the indictment. And before accepting your plea, it is my duty to advise you that under that third count charging you with theft of property of one George Koester, having a value in excess of One Hundred and Fifty Dollars and consisting of five pistols, one rifle, one jacket, a quantity of jewelry and a quantity of ammunition, having a value in excess of One Hundred and Fifty Dollars I may sentence you to the Illinois State Penitentiary for any term of years not less than one and not more than ten, and I may make that consecutive to all the other penalties about which I have advised you this morning; do you understand that, sir?

DEFENDANT MYERS: Yes, sir.

THE COURT: And knowing and understanding the penalties to which you are subjected under that third count of that indictment, 69-2524, do you still persist in your guilty plea thereto?

DEFENDANT MYERS: Yes, sir.

It is incumbent upon the court before accepting a plea of guilty to inform the defendant of the consequences of his plea and the maximum penalty which may be imposed upon him. Ill. Rev. Stat. 1969, ch. 38, par. 115-2(2). It is also necessary that the proceedings in open court must establish that the defendant clearly understands his rights and the nature of the charge against him. Ill. Rev. Stat. 1969, ch. 110A, par. 401(b). These requirements are further elucidated by statements in the case law. See People v. Ballheimer (1967), 37 Ill. 2d 24, 224 N.E. 2d 811; People v. Kontopoulos (1962), 26 Ill. 2d 388, 186 N.E. 2d 312.

The record in this case shows that the defendant was fully informed of his rights and the consequences of his guilty plea, and that he persisted in that plea. We, therefore, conclude that the defendant's plea was properly accepted by the trial court.

We have reviewed the record and find no defects which merit our further consideration. A plea of guilty, voluntarily and understandingly entered, waives all defects not jurisdictional, for the reason that the necessity to prove the factual situation is removed by defendant's admission of guilt. People v. Scott (1963), 29 Ill. 2d 429, 194 N.E. 2d 197; People v. Green (1959), 17 Ill. 2d 35, 160 N.E. 2d 814.

We find that an appeal would be wholly frivolous, and, therefore, the motion of the Public Defender is allowed, and judgment is affirmed.

Judgment affirmed.

McNAMARA, P.J., and DEMPSEY, J., concur.



3 IA³ 125

NO. 54929

MAR 20 1972

DOROTHY TICE,

Plaintiff-Appellant,

VS.

LICENSE APPEAL COMMISSION OF THE
CITY OF CHICAGO, A. L. CRONIN,
Chairman, and RICHARD J. DALEY,
as Local Liquor Control Commissioner
of the City of Chicago,

Defendants-Appellees.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
EDWARD J. EGAN,
PRESIDING.

ABST.

MR. PRESIDING JUSTICE LEIGHTON delivered the opinion of the court:

This case arises from a complaint filed pursuant to the Administrative Review Act. Dorothy Tice, the plaintiff, appeals from a judgment that affirmed revocation of her local liquor license. She presents two issues. 1. Whether the findings of the Local Liquor Control Commissioner are contrary to the manifest weight of the evidence. 2. Whether plaintiff's failure to notify the police of a shooting which occurred in her tavern furnished a ground for revocation of her liquor license.

On June 29, 1969, plaintiff owned a tavern at 504 East 71st Street in Chicago. Sometime during that evening, Clarence James Walker, plaintiff's part-time bartender, came into the tavern. Walker was intoxicated. Plaintiff and Walker had a conversation about a claimed over-payment of money to Walker by plaintiff. Either during or sometime after the conversation, Walker was shot in the right arm. Walker was taken to a hospital. There he spoke to a policeman who later that evening went to plaintiff's home. In answer to questions, plaintiff told the officer that a gun she had in the tavern accidentally discharged; and that either while taking the gun from underneath a counter to put it on the bar or while putting it in her purse, the gun went off. According to the officer, plaintiff said that she did not know anyone had been injured; therefore, she did not call the police. Plaintiff was arrested and

charged with aggravated battery on Walker, failure to register a firearm and with being the keeper of a disorderly house.

On September 30, 1969 the Local Liquor Control Commissioner served notice on appellant that he was going to conduct hearings to determine whether her liquor license should be revoked. Among six grounds for revocation, plaintiff was charged with four ordinance and statutory violations in connection with the occasion when Walker was shot in her tavern. At the hearings, Walker and two police officers testified for the Commissioner; an employee testified for plaintiff. After several sessions, the Local Liquor Control Commissioner found that on June 29, 1969 plaintiff discharged a firearm within the limits of Chicago; that she permitted an altercation between her and Walker which resulted in his being shot; that plaintiff failed to call or otherwise notify the police concerning the altercation; and that plaintiff, a licensee, owned, possessed and discharged an unregistered firearm on the licensed premises, all contrary to the ordinances of the city, the statutes of the state and the rules of the Illinois Liquor Control Commission. The Commissioner ordered revocation of plaintiff's liquor license.

Plaintiff appealed to the License Appeal Commission. On January 22, 1970, the revocation was sustained. The Appeal Commission found that with exception of the charge that plaintiff fired an unregistered firearm on licensed premises, the record sustained the findings of the Commissioner. Thereafter, plaintiff filed her complaint for judicial review of the records before the Local Liquor Control Commissioner and the License Appeal Commission. Summons issued. As its answer, the Commission filed the transcripts of the respective proceedings. After a review, the trial court sustained affirmance of the revocation order.

Plaintiff contends that the findings of the Local Liquor Control Commissioner are contrary to the manifest weight of the evidence. She argues that the evidence adduced at the revocation hearings did not prove she intentionally or voluntarily fired a gun in her tavern or that her conduct was "unnecessary and contrary to ordinary human conduct." Plaintiff insists that a mental state is required for violation of the city ordinance which provides that "[n]o person shall fire or discharge any gun, pistol, or other firearm within the City, * * * " Municipal Code of Chicago, 1969, §193-29.

In support of this argument plaintiff cites Daley v. Thaxton, 92 Ill. App. 2d 277, 236 N.E. 2d 433, a case involving §193-1 of the Municipal Code of Chicago which provides in part that "[a]ll persons who shall willfully assault another in the city, * * * shall be deemed guilty of disorderly conduct * * * ." We held in Thaxton that failure of the charge to allege and of the Local Liquor Control Commissioner to find that the proscribed conduct was done willfully prevented revocation of a local liquor license. The ordinance in Thaxton required that the proscribed conduct be done willfully. The ordinance in the case requires no mental state. Therefore, plaintiff's reliance on Daley v. Thaxton is misplaced.

What constitutes the violation of a municipal ordinance depends on its provisions. Intent, motive, malice or wantonness may or may not constitute elements of an offense defined by a municipal ordinance. 62 C.J.S. Municipal Corporations §315. If the ordinance forbids the doing of an act and makes its commission criminal without regard to intent, doing of the inhibited act constitutes the crime. City of Petersburg v. Whitnack, 48 Ill. App. 663; People v. Player, 377 Ill. 417, 36 N.E. 2d 729; 9 McQuillin, The Law of Municipal Corporations §27.47 (3d ed. 1964). In this case proof that on the occasion in question plaintiff fired a gun in her tavern proved a

violation of §193-29 of the Municipal Code of Chicago. Proof of intent or other mental state was unnecessary. City of Petersburg v. Whitnack, supra. The findings and conclusions of the Local Liquor Control Commissioner were prima facie true and correct until plaintiff proved the contrary. Weinstein v. Daley, 85 Ill. App. 2d 470, 229 N.E. 2d 357. Not only did plaintiff fail to do so; the record discloses that the Commissioner's evidence was uncontradicted. Walker, the man who was shot, testified that the incident occurred in plaintiff's tavern. The police officer who questioned plaintiff told of her admissions that she was either putting her gun on the bar or in her purse when it went off; and that she did not call the police. We conclude that this uncontradicted evidence sustained the findings of the Commissioner. See Nechi v. Daley, 40 Ill. App. 2d 326, 188 N.E. 2d 243 and Legones v. License Appeal Com'n. of City of Chicago, 100 Ill. App. 2d 394, 241 N.E. 2d 499.

Plaintiff also contends that her failure to notify the police did not furnish a ground for revocation of her license. We do not agree with this contention. Violation of an ordinance may be a ground for revocation of a local liquor license. Zito v. Illinois Liquor Control Commission, 113 Ill. App. 2d 103, 251 N.E. 2d 727. In Daley v. Kilbourn Club, Inc., 64 Ill. App. 2d 235, 211 N.E. 2d 778 and in Collins v. Daley, _____ Ill. App. 2d _____, 266 N.E. 2d 453 we held that the failure of a licensee or his agent to call the police and report a shooting incident in the licensed premises were adequate grounds for revocation of a local liquor license. The judgment is affirmed.

Affirmed.

Schwartz, J. and Stamos, J., Concur.



ABST.

NO. 55752

1 3 I.A.³₂₀ 172 26

PETER J. VLAHAKIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellant,	)	COOK COUNTY
)	
vs.)	
)	
RICHARD G. PARKER,	)	HONORABLE
	)	MARTIN G. LUKEN,
Defendant-Appellee.	)	PRESIDING.

MR. PRESIDING JUSTICE LEIGHTON delivered the opinion of the court:

This is a pro se appeal by Peter J. Vlahakis from two post-judgment orders. Originally, the appeal was docketed in the Supreme Court; but in an order that found lack of jurisdiction, the case was transferred to this court. Appellant, a layman, has prepared and filed his own brief. No appearance has been filed by appellee. Despite this fact, we will consider the merits of this appeal. Taylor, et al. v. Shaw, ____ Ill. App. 2d ____, ____ N.E. 2d ____ (55431); see Daley v. Jack's Tivoli Liquor Lounge, Inc., 116 Ill. App. 2d 264, 254 N.E. 2d 814. The issue is whether the trial judge abused his discretion when he denied appellant's motions to change venue and to vacate a dismissal for want of prosecution.

This issue arises out of a suit filed by appellant to recover from appellee \$850 plus costs and \$1,000 in damages for the alleged breach of a contract to sell a used car. Appellee appeared and filed an answer which denied the material allegations of the complaint. On December 16, 1969 the suit was dismissed for want of prosecution. Two days before expiration of the 30-day period, appellant filed motions for a change of venue and to vacate the dismissal. The motions were heard on January 21, 1970. On January 17, more than 30 days after the dismissal, appellant served notices of the motions on appellee. The trial judge denied the motions by orders which found that the notices on appellee were "[s]erved too late and beyond term time."

In a brief that exudes vehemence and indignation, appellant contends that the trial judge abused his discretion when he refused to grant the motions for change of venue and for vacature of the dismissal. Arguing with intensity, and invoking broad constitutional concepts, appellant cites a number of cases, none in point. Relying on allegations which, if true, go to the merits of his controversy with appellee concerning sale of the used car, appellant makes broadside charges of fraud and collusion which impugn appellee and the court in which appellant sought justice. We are constrained to observe that in his vehemence and indignation appellant fails or refuses to recognize the rules of law by which the trial judge was bound when, without notice to appellee, appellant filed motions to change venue and to vacate the dismissal for want of prosecution.

Our civil practice act provides that "[m]otions, notices regarding the same, hearings on motions, and all other matters of procedure relative thereto, shall be according to rules." Ill. Rev. Stat. 1969, ch. 110, par. 49. Supreme Court Rule 104(b) requires that "[p]leadings subsequent to the complaint, written motions and other papers * * * shall be filed with the clerk with a certificate * * * or other proof that copies have been served on all parties who have appeared * * * ." Ill. Rev. Stat. 1969, ch. 110A, par. 104(b). Thus, by statute and rule, appellee was entitled to notice of appellant's motions to change venue to vacate the dismissal.

In general, where statutes or rules so specify, or where principles of natural justice require, notice that a motion will be presented to the court must be given the adverse party. 60 C.J.S. Motions and Orders, §15. Although notice of a motion can be waived by the party entitled, an order entered on a motion without notice is void. Petition of Volpe, 328 Ill. App. 311, 66 N.E. 2d 146. It is a well-recognized rule that a court

cannot vacate or modify the substance of a legal order without notice to interested parties because in the absence of notice the vacature or modification is null and void. See Schmahl v. Aurora Nat. Bank, 311 Ill. App. 228, 35 N.E. 2d 689; 37 Am. Jur. Motions, Rules and Orders §9; compare Curran v. Abbot, 141 Ind. 492, 40 N.E. 1091 (1895); Bratberg v. Advance-Rumely Thresher Co., 61 N.D. 452, 238 N.W. 552 (1931); Edgar v. Garrett, 10 Ariz. App. 98, 456 P. 2d 944 (1969).

The order which dismissed appellant's suit was a default judgment. Under Ill. Rev. Stat. 1969, ch. 110, par. 50(5), for 30 days on appellee's motion, the trial court had the power to set aside the default. Binder v. Dunn, 121 Ill. App. 2d 30, 257 N.E. 2d 179; compare Cargueville Co. v. Gladstone, 106 Ill. App. 2d 375, 245 N.E. 2d 900. The motion, however, had to comply with requirements of the statute; that is, it had to be a motion capable of supporting a valid order. A motion without notice does not possess this capacity. See Petition of Volpe, *supra*; Schmahl v. Aurora Nat. Bank, *supra*; compare Elliot Construction Corporation v. Zahn, 99 Ill. App. 2d 112, 241 N.E. 2d 129.

As to appellant's motion for change of venue, our law has always required that notice of it be given parties who have appeared. Ill. Rev. Stat. 1969, ch. 136, par. 5, see Historical Note, S.H.A. ch. 146, §5; Marble v. Bonhotel, 35 Ill. 240; Graves v. Shoefelt, 60 Ill. 462; compare Johnson v. United Motor Coach Co., 66 Ill. App. 2d 295, 214 N.E. 2d 326. More important than the notice, however, was the inadequacy of the motion. It was presented after the trial judge had made a substantive ruling. This was too late. Marshall Savings & Loan Association v. Henson, 78 Ill. App. 2d 14, 222 N.E. 2d 255. For these reasons, we are compelled to conclude that there is no merit to appellant's contention. Denial of his motion to change venue and to vacate the dismissal for want of prosecution was not an abuse of

judicial discretion. We affirm the judgments.

Judgments affirmed.

Schwartz, J. and Stamos, J., Concur.

Publish abstract only.



PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

WILLIAM BRANCH,

Appellant.

)
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
)
)
)
)
)

ABST.

MR. JUSTICE BURMAN delivered the opinion of the court.

The defendant, William Branch, was charged in an indictment with committing armed robbery on August 31, 1970, in violation of Section 18-2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1969, Ch. 38, par. 18-2). He was represented by counsel and waived a jury trial. The trial judge found him guilty as charged and the defendant received a sentence of probation for five years, the first year to be served in the County jail.

The defendant filed a notice of appeal and the public defender was appointed to represent him. In this court the public defender filed a motion after serving the defendant with a copy, in which he requested leave to withdraw on the ground that he had concluded from a review of the evidence that an appeal would be without merit.

Pursuant to the ruling in the case of Anders v. California, 386 U.S. 738, he attached a brief in support of his motion to withdraw. It appeared to him that the only basis of appeal was the denial by the court of the defendant's motion to suppress the identification of the defendant.

The record reveals that the defendant waived a jury trial after having been properly informed of his constitutional right to a jury trial. We briefly summarize the evidence. A gas attendant was robbed by a man with a gun at about 11:25 P.M. on August 31, 1970. After taking his money the man drove off. The attendant noted the license number on the black Ford car and the police were so notified. They subsequently located the car with the license

number in question. Upon searching the car they found a .22 caliber revolver under the front seat. They brought the defendant, who was the occupant of the car, to the gas station about five or ten minutes after the robbery and the complaining witness identified the defendant as the man who had just robbed him. He also identified him at a lineup and at the trial.

The defendant was notified by this court on September 13, 1971, of the public defender's motion for leave to withdraw as his counsel and a copy of his motion and brief was attached. We informed him that he had until November 12, 1971, to file any points he might have in support of his appeal. We also informed him that after such date, we would make a full examination of all of the proceedings and decide whether the appeal is wholly frivolous, and if we so found, we would grant the Public Defender's request for withdrawal and affirm the judgment without further appointment of counsel.

In People v. McMath, 45 Ill.2d 33, 36, cited by the Public Defender, the police officers who arrested the defendant took him immediately to the complaining witness who identified him as the man who robbed her. In holding that the testimony concerning the identification was properly admitted, the Supreme Court stated,

***the service station confrontation was justified because prompt identification was necessary to determine whether defendant was the offender or whether the officers should continue their search.

We have made a complete examination of all of the proceedings in accordance with the requirements in Anders and have concluded that there is no merit to this appeal. The Public Defender's request for leave to withdraw as defendant's counsel is therefore granted, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

ADESKO, P.J. and DIERINGER, J.

CONCUR (abstract only)

Mrs. King. During defendant's cross-examination, the State introduced three prior convictions for the purpose of impeaching his credibility.

We consider first defendant's contention that he was not proved guilty beyond a reasonable doubt because the testimony of the accomplice was not sufficient to sustain the conviction. The uncorroborated testimony of an accomplice, if it convinces the trier of fact beyond a reasonable doubt, is sufficient to support a conviction. People v. Mentola, 47 Ill.2d 579, 268 N.E.2d 8. Although inherently suspect as proof, the considerations involved in the receipt of accomplice testimony go to the weight and credibility of the witness. People v. Neukom, 16 Ill.2d 340, 158 N.E.2d 53. Such questions are peculiarly within the province of the trier of fact and a judgment will not be set aside unless it is plainly apparent to the reviewing court that defendant was not proved guilty beyond a reasonable doubt. People v. Nitti, 8 Ill.2d 136, 133 N.E.2d 12.

In the instant case, the trial court, as trier of fact, was aware that the accomplice-witness was addicted to narcotics and that he hoped for leniency. These were matters which he took into consideration in determining the credibility of the witness. Acknowledging the suspicious nature of accomplice testimony, the trial judge stated that he nonetheless found defendant guilty beyond a reasonable doubt.

The trial court, however, relied not only on the testimony of the accomplice, but also on that of Mrs. King which substantially corroborated the facts related by Johnkie. This corroboration by another credible witness entitles the testimony of the accomplice to additional weight. People v. Hermens, 5 Ill.2d 277, 125 N.E.2d 500. We therefore hold that the evidence presented was sufficient to sustain a conviction.

Defendant also argues that the trial court improperly permitted the introduction of his three prior convictions into evidence in order to impeach his credibility. None of the

conviction statements indicated on their face that defendant had been represented by counsel at the time of those convictions. Defendant claims that, since a conviction secured in violation of the right to counsel cannot be used for impeachment and since the conviction statements were silent on this issue, he was prejudiced by their use at the trial of the instant cause.

In Burgett v. Texas, 389 U.S. 109, the Supreme Court held that a conviction obtained in violation of the right to counsel could not be used against a defendant to support his guilt or enhance his punishment for a subsequent offense. In that case, the conviction statements which were introduced into evidence state affirmatively that defendant had not been represented by counsel. Other federal courts, in determining the scope of this decision, have held that a trial court has the power to hold a hearing to determine whether a prior conviction was secured in violation of the Constitution, United States v. Martinez, 413 F. 2d 61 (7th Cir.), and that a defendant who claims that a prior conviction is constitutionally invalid must be given an opportunity to establish this contention in the trial court. United States v. Thoresen, 428 F.2d 654 (9th Cir.). Defendant maintains that the holdings of these cases, together, require this court to reverse his conviction. We do not agree.

The State argues that the principle enunciated in the Burgett case applies only to prior convictions which were used either to enhance punishment under various statutes or to make a criminal statute applicable to an offender, rather than where the prior convictions were used to impeach defendant's credibility. See also U.S. ex rel Walker v. Follette, 443 F.2d 167 (2nd Cir.). However, we do not have to reach that issue to determine this appeal. In the instant case, defendant did not allege that he was, in fact, denied counsel in the prior proceedings. The thrust of the cases cited by defendant, Burgett, Martinez and Thoresen, supra, is that the burden is on defendant to raise the issue by a positive statement that his constitutional rights were violated.

We believe that such a conclusion is proper, and we so hold. Since the defendant made no affirmative showing that he had been without representation at the time of the prior convictions, defendant was not prejudiced and the court properly permitted the State to introduce his three prior convictions into evidence to impeach his credibility.

For the foregoing reasons, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

DEMPSEY and McGLOON, JJ., concur.


 1 3 I.A.³ 309
 MAY 20 1969

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
v.	)	COURT OF COOK COUNTY.
)	
JOSEPH L. SCOTT (Impleaded),	)	Hon. Kenneth E. Wilson,
	)	Presiding.
Defendant-Appellant.)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Defendant, together with his wife and Jimmie Johnkie, was charged with burglary. After the State dropped the charge against his wife, defendant was convicted of burglary in a bench trial at which Johnkie testified for the State. Defendant was sentenced to a term of three to six years. On appeal he contends that the court improperly permitted the State to impeach his credibility by the introduction of prior convictions, and that the testimony of the accomplice was not sufficient to sustain the conviction.

An apartment was burglarized on October 28, 1969, and among the items taken was a persian lamb coat. Johnkie testified that he and defendant committed the burglary in question and sold the coat to Mrs. Muzette King. Johnkie stated that he was under indictment on the instant charge and that he was presently serving sentences for two other burglaries. He believed that he had entered a plea of guilty to this charge and that he hoped the State would be "favorable" to him because of his testimony. He testified, however, that the State had not promised him anything. Johnkie admitted that he was a narcotics addict, and that he supported his habit by burglary.

Muzette King testified that she purchased the persian lamb coat from defendant on October 28, 1969, the same day as the burglary. Defendant and Johnkie approached her on the street and defendant asked her to loan him some money on the coat so he could buy something for his wife. She gave him \$35. She testified further that she had seen defendant and Johnkie on the street at least several times a month during the past five years.

Defendant denied participation in the burglary, but admitted that he was present when Johnkie sold the coat to



3 I.A.³ 312
MAR 20 1972

54658

T & T TRUCKING & EXCAVATING
COMPANY,

Plaintiff-Appellee,

vs.

JOHN F. CHAPPLE COMPANY,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Samuel Shampberg,
Presiding.

ABST.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

T & T Trucking & Excavating Company (plaintiff) and John F. Chapple Company (defendant) entered into a written subcontract agreement whereby plaintiff was to perform excavation and fill work for defendant, which was a general contractor on a construction project. Plaintiff sued to recover an allegedly unpaid balance on the subcontract. After trial without a jury, the court entered judgment for plaintiff in the amount of \$3021.50. Defendant appeals.

The evidence shows that plaintiff started the work during early March of 1965. One of the owners of plaintiff company testified that, as the work progressed, it became necessary to remove ground to an additional depth, which would necessitate additional lineal excavation and the use of more fill. This witness testified that he discussed this situation at the site with defendant's job superintendent. The superintendent agreed that this was necessary and told plaintiff's representative not to stop but to continue with the work and that the cost would be taken care of after the job was completed. Thereupon plaintiff's company proceeded with additional excavation and supplied and placed more fill.

The question of recovery for this extra work and material is the basis for the disagreement between these parties. The judgment entered by the trial court included an allowance to plaintiff for the disputed extra in the amount of \$2002; as billed to defendant by plaintiff. It is conceded that plaintiff is entitled to recover certain amounts aside from the contested extra. The total contract price was \$7375. The parties agree that defendant paid plaintiff \$4837.50 in cash on account of the contract price and advanced \$1523 to plaintiff's subcontractor named Ruscitti. Defendant is also entitled to a credit of \$150 for sundry minor items not completed under the contract. This makes total credits due defendant in the amount of \$6510.50, with a balance therefore due plaintiff in the amount of \$864.50. In addition, it is agreed that there is due plaintiff \$120 for extra work, represented by a written order from defendant, plus \$45 for two small piers constructed by plaintiff. Calculation shows that there is initially due plaintiff the sum of \$1029.50 as reflected by these items.

We will now examine the contentions of the parties with regard to the disputed extra. The first issue is the alleged failure of plaintiff to follow the provisions of the written contract, including the requirement of a written order from the contractor for extra work. The principles of law applicable to this situation have been well established by the courts of Illinois. Where a formal building contract requires a written order for performance of extra work, this condition of the contract may be the subject of an oral waiver by the owner in dealing with a general contractor or by a general contractor in dealing with a subcontractor. *Watson Lumber Co. v. Guennewig*, 79 Ill.App.2d 377, 395; *Salomon-Waterton Co. v. Union Asbestos & Rubber Co.*, 263 Ill.App. 583, 590; *Theis v. Svoboda*, 166 Ill.App. 20, 23

and *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill.App. 210, 219-220. Whether or not there has been a waiver of contractual conditions in any particular case is a factual issue which must be determined by the trial court. *Connelly v. Wallin*, 181 Ill.App. 212, 215.

In the case at bar, the trial court determined that there was a waiver and that plaintiff was entitled to recover without a written order for the extras. We find that this result is amply supported by a convincing preponderance of the evidence. In such a situation we will adhere to the result reached by the trial court. *Schulenburg v. Signatrol Inc.*, 37 Ill.2d 352, 356; *Hadley v. White*, 367 Ill. 406, 409.

The next issue is the amount of recovery which should be granted plaintiff. The written contract provided that the price of extra work performed by the subcontractor should be his cost of material and labor, including union contributions and insurance, plus 10% for overhead expense and profit. Waiver by the contractor of the condition requiring a written order for extras does not affect remaining contract provisions which specify the method of computing the amount of recovery for the extra. It has been held in Illinois that where damages are allowable in connection with a written building contract, the amount of recovery must be determined by and limited to the contract provisions. *Underground Construction Co. v. Sanitary District*, 367 Ill. 360, 371; *Chicago Great Western Railroad Co. v. American McKenna Process Co.*, 200 Ill.App. 166, 167. Therefore, the parties are bound by the provisions of the contract with reference to the amount to be allowed plaintiff for the extra.

Although the evidence as to the amount due plaintiff on this extra in accordance with the contract can best be described

as sketchy, the record shows that plaintiff attempted to calculate its damages in accordance with basic prices that it used in arriving at the original contract price. For example, plaintiff attempted to recover for and billed defendant for additional sand fill at the rate of \$2.80 per cubic yard; without regard to plaintiff's actual cost. However, the contract between these parties contains no unit prices but simply expresses a gross amount for performance of the entire work. Under the terms of the agreement, the measure of damages should have been based upon the actual cost to plaintiff of the material and labor as above set forth.

Although we disagree with the amount awarded plaintiff, we will not return the case to the trial court for further evidence. 43 Ill.2d Rule 366(a). As regards this disputed extra, we find from all the evidence that plaintiff is entitled to recover \$474.64 for additional excavation. This is computed at the rate of \$1 per foot for 474.64 feet. In addition, the evidence shows that plaintiff is entitled to recover for 350 cubic yards of sand fill at his unit cost of \$1.75 per yard, being in the amount of \$612.50. This makes a total of \$1087.14 to which should be added 10%, or \$108.71, for overhead expense and profit; making a total of \$1195.85 due plaintiff by virtue of the disputed extra. Adding the conceded amount of \$1029.50 due on the contract, as above described, we conclude that a total of \$2225.35 is due plaintiff.

It remains to consider defendant's claim of setoff. The contract required that all fill furnished by defendant be compacted to 95% according to grade as specified on the various drawings. Defendant's construction manager testified that physical examination of the site after plaintiff had withdrawn showed soft spots in the fill which plaintiff had installed.

A testing service was called to take samples of the soil and determine the degree of compaction by laboratory tests. This was done on October 5, 1965, approximately two months after plaintiff had withdrawn from the site. The evidence shows that there were five test locations and that three or four samples were taken from each of these locations. All but three of these samples showed failure to comply with the contract requirement of 95% compaction. The testing company recommended performance of additional work at the site.

Defendant's testimony is that this situation could not be remedied until the spring, because of weather conditions; but that necessary additional compaction work was done by another company at a cost of \$600, which was a fair and reasonable price for the work done. Plaintiff brought out on cross-examination that the sites from which the various samples were taken by the testing service were selected by defendant's own representatives. Plaintiff also produced testimony that the three test sites were selected near areas where there was standing water. It is true that this selection of the test sites by defendant tends to cast some doubt upon defendant's position. On the other hand, the evidence that defendant actually paid \$600 to another company for additional work, which was included in the contract with plaintiff, when considered with the test results, tends to strengthen defendant's position. Further, there is uncontradicted testimony by a qualified expert called by defendant that the presence of water has no relation to percentage of compaction. We will therefore allow defendant a setoff in the amount of \$600. We find accordingly that the total sum of \$1625.35 is due plaintiff.

The judgment in favor of plaintiff is affirmed but it is modified by reducing the amount thereof to \$1625.35.

Judgment for plaintiff affirmed,
as modified.

BURKE, J. and LYONS, J. concur.



55836

ARST.
3 I.A. 318
MAR 20 1972

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
CURBIE McCLAINE, ROBERT SIMS and)	
REGINALD FONTAINE,)	
	)	Hon. Philip Romiti,
Defendants-Appellants.	)	Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Defendants, Curbie McClaine, Robert Sims and Reginald Fontaine, were jointly indicted for attempt robbery. Ill.Rev. Stat. 1969, ch.38, par.8-4. Defendants were arraigned and the public defender of Cook County was appointed to represent them. The defendants all pleaded not guilty. Upon motion of their counsel, a list of witnesses and a bill of particulars were filed. After a bench trial, all defendants were found guilty as charged. McClaine and Fontaine were sentenced to the penitentiary for terms of from one to three years. Defendant Sims was sentenced to the penitentiary for a term of from two to five years. All three defendants appeal.

On August 16, 1971, the public defender filed a written motion in this court for leave to withdraw as attorney for defendants. A brief was filed in support of this motion stating that the only possible basis for appeal would be the question of whether error was committed when the trial court received in evidence, for purposes of impeachment, a certified record of a previous conviction of defendant Sims for burglary. In this regard, the brief refers to People v. Montgomery, 47 Ill. 2d 510 but concludes that it is inapplicable here. The brief indicates that it has been filed pursuant to Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396. Copies

of the notice, motion and brief were all sent to each of the defendants by the public defender by mail on August 16, 1971.

On September 13, 1971, on direction by the court, its administrative assistant wrote, and mailed, a letter to each of the three defendants. These letters advised the defendants of the pendency of the motion and of service thereof. Defendants were also advised that the court had given them until November 12, 1971 to file any points that they might desire in support of their appeal; after which the court would make a full examination of the proceedings and determine whether the appeal is frivolous. These letters also advised defendants that, if the court found no merit in the appeal, counsel's request to withdraw would be granted and the judgment affirmed; but, that, if the court deemed any legal points raised to be arguable on their merits, other counsel for the defendants would be appointed before proceeding.

No pleadings or memoranda of any kind have been received by this court from defendants McClaine or Fontaine in response to the notice sent by the public defender or to the letters sent by this court. However, on November 10, 1971, defendant Robert Sims sent to the court administrator a letter which was duly transmitted to the court. This letter also referred to Montgomery and cited other legal authorities. At our request, on November 11, 1971, by letter to defendant Sims, the court administrator acknowledged receipt of this communication and also sent a copy thereof to the public defender. The public defender was requested to give to the court, at his earliest convenience, any statement or comment that he might wish to make regarding the letter. On November 16, 1971, the public defender sent a letter to this court which stated:

"The remarks contained in defendant's letter of November 10th to this court are frivolous. The issues which defendant raises with regard to double jeopardy with habitual criminal act and cruel and unusual punishment, have no basis in fact."

We have carefully reviewed the entire record, including all of the evidence presented at trial. In our opinion, the evidence proved all three of the defendants guilty of attempt robbery beyond reasonable doubt. Disparity in the sentences is justified by the fact that the hearing on aggravation and mitigation showed that the two defendants who received lighter sentences were without previous felony convictions while defendant Sims was previously convicted of a felony. We agree with the position of the public defender that there is no error in this record and that the appeals of defendants are frivolous so that the judgments should be affirmed. However, we will add one further comment for the sake of completeness.

Defendant Sims testified in his own behalf. At the conclusion of all the evidence, the State offered in evidence certified proof of his conviction in Cook County for burglary on January 21, 1960 pursuant to his plea of guilty entered to Indictment No. 59-4169. He was sentenced to the penitentiary for a term of from three to seven years. This evidence was received as impeachment of the testimony of Sims. Counsel for defendant stated in open court that there was no objection to this evidence and that it would be stipulated.

In his brief, the public defender cited the recent case of *People v. Montgomery*, 47 Ill.2d 510 in which the Supreme Court of Illinois established guidelines for use of evidence of prior convictions. Defendant Sims noted *Montgomery* in his letter dated November 10, 1971. In that case, the Supreme Court held that a 21 year old prior conviction "****bore no

rational relationship to the defendant's present credibility, and should not have been admitted." 47 Ill.2d 510 at 511. We have given careful consideration to this point.

We note first that the opinion in Montgomery was filed on January 25, 1971; on the same date that the certified copy was received in evidence in the case at bar. The court and attorneys were presumably not aware of the decision. However, defendants were not actually sentenced until January 26, 1971. We have, therefore, considered the possible application of Montgomery.

We have concluded that the principles expressed in Montgomery have no effect upon the conviction or sentence in the case at bar for any one and all of these reasons:

First, Montgomery has no application of any kind to the guilt and conviction of defendants McClaine and Fontaine.

Second, defense counsel stated at trial that there was no objection to receipt of the evidence in question.

Third, the guidelines approved in Montgomery provided that evidence of prior conviction "***is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date." 47 Ill.2d 510 at 516. In the case at bar, the certified proof showed that defendant Sims was sentenced to the penitentiary on January 21, 1960 for a minimum of three and a maximum of seven years. He could not have been released earlier than two years and six months after sentence which would be no earlier than July 21, 1962. Since his release date was necessarily within ten years of the date upon which the proof of conviction was offered in evidence, the precepts announced in Montgomery have been fully complied with.

Fourth, in any event there would be no error in receiving this evidence. This was a bench trial and the certified copy would have been properly received and considered by the court as evidence in aggravation. The sentence imposed upon Sims of from two to five years seems fair, and perhaps even lenient. The remaining evidence of guilt, quite aside from this previous conviction is so strong and clear that we find readily and without reasonable doubt that the assailed evidence did not prejudice defendant Sims and actually did not contribute to his conviction.

We, therefore, conclude that the appeals of all three of the defendants lack merit and are frivolous. The motion of the public defender for leave to withdraw as counsel for all three defendants is granted and the judgments of the trial court are affirmed as to all three defendants.

Judgments affirmed.

BURKE, J. and LYONS, J. concur.

3IA³ 357

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

ABST.

General No. 11426

Agenda 71-88

In The Matter of The Estate of Ferd
A. Luther, Deceased.

J. C. Luther,

Petitioner-Appellant,

vs.

Muriel Stemberger and Marjorie Jean
Luther,

Respondents-Appellees.

Appeal from
Circuit Court
Ford County

MR. JUSTICE CRAVEN delivered the opinion of the court:

This is an appeal from orders of the trial court in probate alleging as errors: (1) that the trial court erred in denying appellant's motion for summary judgment on fees; (2) that the trial court erred in reducing from \$2,844.86 to \$2,000.00 attorneys' fees of L. K. Hubbard for additional, extraordinary and unusual services rendered as appellant's attorney in probate; and (3) that the trial court erred in allowing attorneys' fees of \$4,000 to the attorneys for the successor representatives of the estate for the final distribution and settlement of the estate of Ferd A. Luther, deceased.

Decedent, Ferd A. Luther, died February 20, 1958, leaving a Last Will which nominated appellant, J. C. Luther, as executor. J. C. Luther, son of decedent and a practicing attorney, probated the will and was issued Letters Testamentary as executor on March 15, 1958.

The Will bequeathed to decedent's wife the sum of \$50,000 absolutely and the residue and remainder of the estate to her for life, with remainder to decedent's three children, J. C. Luther, Muriel Stemberger and Marjorie Jean Luther. The testator's widow died August 2, 1967.

During his tenure as executor from March 15, 1958, until his resignation on November 10, 1967, the executor failed to carry out many basic fiduciary duties. He filed an inventory on March 6, 1959, a week short of one year after the estate was opened, but no steps were taken in the court after that date until November 10, 1967, when he resigned as executor.

On November 7, 1967, just before resignation, J. C. Luther entered into an indemnity agreement with the other two remaindermen, Muriel Stemberger and Marjorie Jean Luther, by which he agreed to hold them harmless against any and every claim or liability, including court costs and reasonable attorneys' fees, which may be incurred by the estate of Ferd A. Luther, deceased, or the other parties from any source whatsoever resulting from any action taken or any omission to act by him as executor of the will of Ferd A. Luther, deceased.

Muriel Stemberger and Marjorie Jean Luther were appointed administrators with the will annexed on November 10, 1967, and retained as attorneys, McDermott, Will & Emery. The administrators and their attorneys proceeded to carry out the duties of the legal representatives and performed the necessary probate functions, including payment of fees of witnesses to the will and publication for claims, obtaining fees due decedent for services as executor of other estates, obtaining an Illinois Inheritance Tax Order and

refund, and sorting and accounting for property which had never been sorted between the estate of Ferd A. Luther, the life estate created under his will, and the estate of Elisabeth Luther, widow of Ferd A. Luther. An amended Illinois Inheritance Tax return was filed on July 8, 1968, more than ten years after decedent's death, by J. C. Luther as an heir of decedent, and almost eight months subsequent to his removal as executor.

On December 8, 1967, J. C. Luther filed his final report as executor, but said report made no claim by him for services rendered as executor or as attorney for the estate. It likewise made no claim for services rendered by attorney L. K. Hubbard.

On November 29, 1968, J. C. Luther filed a motion for fees for himself. The administrators filed an answer denying that he was entitled to fees. Thereafter, several additional pleadings were filed, including the motion by J. C. Luther for summary judgment for the payment of legal fees to himself and to L. K. Hubbard. His motion for summary judgment had attached his affidavit which stated that he had refrained from closing the estate because of an outstanding life estate in the mother. Also attached were copies of certain schedules of the amended Illinois Inheritance Tax Return, showing gross value of the estate for Illinois Inheritance Tax purposes as \$122,989.53 and estimated administration fees of \$7500, an exhibit containing a schedule of minimum fees adopted by the Bar Association of Ford County, and an affidavit of L. K. Hubbard setting forth services rendered by him on behalf of J. C. Luther. The exhibit appended to Hubbard's affidavit shows his services began November 22, 1967, twelve days after J. C. Luther resigned as executor, and lasted through January 17, 1969.

The administrators filed a verified amended answer to the motion for fees. Motion to strike this was filed. Thereafter, the administrators filed their First and Final Account setting forth therein the sum of \$2,000 due L. K. Hubbard for services and no fee due J. C. Luther. It set forth attorneys' fees to McDermott, Will & Emery in the amount of \$4,000 payable from life estate property since the funds in the probate estate were insufficient to cover the attorneys' fees.

At the hearing on J. C. Luther's Motion for Summary Judgment and his Motion to Strike the Amended Answer to that motion, the court denied the motions, determining that a material issue of fact existed, namely the proper allowable amount of attorneys' fees. The court also heard J. C. Luther's motion for attorneys' fees and entered an order fixing attorneys' fees for L. K. Hubbard at \$2,000 and no fees to J. C. Luther.

Thereafter, the Final Account and a Supplemental Final Account were approved, over objection, allowing attorneys' fees of \$4,000 to McDermott, Will & Emery.

Two post-trial motions were filed and denied.

Appellant contends that the affidavits were sufficient to warrant allowance of the motion for summary judgment. The trial court in denying the motion for summary judgment did not thereby determine the case on its merits. An appeal does not lie immediately from an order denying a motion for summary judgment. The result of the order denying such a motion becomes merged in the subsequent trial. Thus, even though a motion for summary judgment is improperly denied, the error is not reversible. This was widely discussed and determined in Home Indemnity Company v. Reynolds & Co., 38 Ill.

App.2d 358, 187 N.E.2d 274 (1st Dist. 1963). As pointed out there, to hold otherwise would be unjust to the party who was victorious at the trial. In fact, it has been held that denial of a motion for summary judgment is merged in a final judgment and is similarly unreviewable, even if the only issue before the trial court was a question of law. (LoSalle National Bank as Trustee v. Little Bill "33" Flavor Stores, 80 Ill.App.2d 298, 225 N.E.2d 465 (1st Dist. 1957)) The court here, after denying the motion for summary judgment, proceeded to hearing on the determination of fees.

The determination of attorneys' fees for services rendered an estate is within the discretion of the probate court. In the proceeding here, J. C. Luther was seeking attorney's fees for himself although he now contends that an executor is entitled to reasonable compensation for his services. A review of the record here fails to show that the determination of the trial court was manifestly or palpably erroneous. In re Estate of James, 10 Ill. App.2d 232, 134 N.E.2d 638 (3rd Dist. 1956).

A review of the services performed by L. K. Hubbard as attorney show that many of these services were performed for J. C. Luther individually, and were not on behalf of the Ferd A. Luther estate or beneficial to such estate. The court apportioned these services and its allowance of \$2,000 was reasonable.

The fees awarded the successor attorneys for the successor representatives in settling the estate were necessary for the prompt and orderly administration of the estate. The trial court had the record before it and the application for their fees was made in the final account. The reasonableness of the amount of

attorneys' fees must rest upon the facts and circumstances of each estate and the amount of the fee is in the discretion of the trial judge. (In re Estate of Scully, 79 Ill.App.2d 368, 223 N.E.2d 735 (4th Dist.1967)) There is no showing that the allowance of \$4,000 was unreasonable or other than commensurate with the services rendered and the amount involved.

JUDGMENT AFFIRMED.

TRAPP, P.J., SMITH, J., concur.



3 - I.A.³ 1972 4 21

No. 54704

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

LOUIS GROSS,
Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

ABST.

HONORABLE
L. SHELDON BROWN,
PRESIDING.

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

The defendant was tried by a jury and found guilty of the offense of armed robbery (Ill. Rev. Stat. 1967, ch. 38, par. 18-2). In this appeal the defendant argues several specific grounds for reversal. After a careful examination of the record, this court finds that the pre-trial procedures employed below denied the defendant due process.

We reverse and remand.

The relevant facts in this case are as follows. The defendant was arrested on May 21, 1969, and remained in custody until August 11, 1969, when he was charged in five indictments with five instances of armed robbery. On August 19, when he was arraigned on all the indictments, the defendant stated that he wished to retain private counsel and made a request for bond reduction. The court, instead, appointed the Public Defender to represent the defendant.

On that same day the defendant was brought before the judge to whom the case had been assigned. After presenting a pre-trial discovery motion, the Public Defender requested a bond reduction hearing. The defendant was sworn and testified to various aspects of his background. The court was informed that the defendant had \$1,000 in cash, and in view of the fact that he was making a request for private counsel, the court was asked to consolidate the five indictments under one bond of \$10,000. It was agreed that the defendant had no prior criminal record. After consideration of these facts, the court reduced the defendant's bond to \$25,000, or one-half of its previous amount.

When the matter of scheduling a trial date for the first indictment arose, the following exchange took place between the judge

and the defendant:

THE COURT: Do you want a trial? We'll give you a trial real quick, as soon as this case on trial is finished, which will be in two days. We'll give you a trial.

THE DEFENDANT: No, I don't -- well, no. I just want to get out. I want a bond reduction so I can get out and retain a lawyer, your Honor. A reasonable bond, if you could see fit.

THE COURT: This is a reasonable bond. I cut it in half for you. What do you want to do, get out on a personal recognizance?

THE DEFENDANT: Could you do that, your Honor, since I don't have no record?

THE COURT: You believe in dreams, don't you.

The court then informed the defendant that if he wished to retain private counsel, it would break his term. The defendant responded that he was confused. The court attempted an explanation:

THE COURT: We can give you a trial real quick. If you don't want a quick trial, then you are agreeing to a continuance. Now, you have your choice. If it's by agreement, it breaks your term and you start a new term over, 120 days. Or we can give you a trial quickly if you want it.

Although the defendant was obviously confused, the record shows neither his appointed attorney, nor any other person, made an adequate explanation to him of the application of the "fourth term" statute to his case. Ill. Rev. Stat. 1967, ch. 38, par. 103-5(a). Upon the suggestion of the State's Attorney, the matter was held over for one day.

On August 20 the defendant appeared, and speaking for himself, stated that he would not accept a continuance by agreement. The case was set for August 25, 1969.

On that date, only six days after his arraignment, the defendant, again speaking for himself, responded that he was ready and that he would like to present some pre-trial motions. Without any inquiry into the nature or form of the motions, the court responded that it was too late on the trial date to entertain any pre-trial motions, and directed the case to be put at the end of the trial call. When the case was called for the second time, a

conference was held at the request of the Public Defender, and afterwards the court refused defendant's pro se motion for a change of venue. A jury was then empaneled, defendant was tried, found guilty, and sentenced.

We find it clear from the record that at the time of the defendant's initial pro se attempt to present his pre-trial motions, the trial had not begun, jury selection had not commenced, nor had the judge ruled on any substantive issue. It is certainly not an abuse of discretion for a judge to postpone the consideration of motions until after the disposition of other business. However, in this instance the court, upon being informed that the defendant wished to present pre-trial motions, did not merely postpone the matter, but rather refused any consideration of the motions, allegedly because they were made too late when presented on the date trial was to commence.

The statute provides for a wide variety of motions commonly referred to as "pre-trial." Ill. Rev. Stat. 1967, ch. 38, par. 114-1 to 114-12. The court's summary refusal to entertain defendant's motions prevents us from discerning the nature of the particular motions the defendant was trying to present, for the defendant was not given the opportunity to describe the type of motions he wished to make. We note that, in view of the attitude with which the antecedent proceedings had been conducted, the defendant should have been given an opportunity to present pre-trial motions that could have substantially affected the subsequent course of his trial. Therefore, we find it was improper for the court to summarily reject the presentation of defendant's pre-trial motions before determining what type of motions were being offered.

Due process is compounded of history, reason and the past course of decisions, and is neither an inflexible procedure nor a technical concept with a fixed content unrelated to time, place and circumstances. Clark v. Morris (1968), 99 Ill. App. 2d 24, 240 N.E. 2d 515. We find that in view of the tone and conduct of the pre-trial proceedings in this case, the refusal of the court to consider

the presentation of pre-trial motions, before the trial had begun, so affected the defendant's substantive rights as to result in a denial of due process.

In view of our decision in this matter, it will not be necessary to consider the other arguments presented in this appeal.

Judgment reversed and remanded.

DEMPSEY and McNAMARA, JJ., concur.



3 I.A.³ 470
MAR 20 1972

No. 55868

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
)	
RUDOLPH McLEARY,	)	HONORABLE
	)	GEORGE B. WEISS,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE LORENZ delivered the opinion of the court:

Defendant Rudolph McLeary was found guilty in a jury trial of robbery (Ill. Rev. Stat. 1961, ch.38, par.18-1) and was sentenced to a term of ten to seventeen years. On appeal defendant argues that the evidence against him was inconsistent and incredible and that the trial court therefore erred in failing to direct a verdict in his favor.

The State presented the testimony of six witnesses.

James Owens testified that he is part owner and operator of a barber shop at 5917 South State Street. Defendant was an employee in the shop. His usual hours were from 9:00 to 7:00. However, on January 10, 1963, he reported to the shop at 4:00 P.M. where he shined shoes as usual until about 6:30. At that time the witness walked to an office located in a backroom of the shop. Defendant was standing in the office holding the witness' gun which had been kept in a locked drawer in the office desk. The witness was ordered to enter the office. Defendant stated that he wanted money and the witness gave him thirteen dollars from the desk. Defendant stated that he wanted more and was given \$100 from the witness' pocket. Earl Cooke, a friend of the witness, then came to the back of the shop and was ordered by defendant, who threatened to shoot him, to enter the office. The witness' partner, Ramey, also came to the office. Defendant then exited the shop through the front door carrying the revolver in his hand.

On cross-examination the witness stated that defendant

took nothing from Cooke, the four or five customers, the other barbers, Mr. Swan, who operated a shoe repair service in the shop or the cash register in the front of the shop. Defendant left the shop through the front door though he might have left through the door from the shoe repair portion of the shop. The witness telephoned the police before 7:00 P.M. One officer came to the shop for about ten minutes. The officer did not talk with the people who were in the shop. The witness was unable to identify that officer. Earl Cooke, witness and the police officer then drove about the area in an effort to locate defendant on the street. Though he knew where defendant lived the witness did not take the search there. The next day on January 11, witness notified the police that he had heard from defendant who had threatened him. At that time seven police officers, including some detectives, came to the shop to investigate. At approximately midnight on January 11, witness went to the police station where he signed a complaint. Defendant was then being held in the police station. The witness stated that the barber shop office was never used for the purpose of writing policy. He also stated that defendant never ran errands for him.

Herbert Ramey testified that he is a partner with James Owens in the barber shop. He testified that defendant came to work at about 5:00 P.M. on the day in question. Later in the day there was a disturbance at the back of the shop and the witness was summoned. There he found defendant standing by the door leading to the office and holding a revolver. The witness asked him to "put away the gun." The defendant responded, "Get back, Herb, get back." Defendant then put on his coat and backed from the shop keeping his gun trained on the witness.

On cross-examination the witness stated that he supposed that defendant sometimes ran errands. He also stated that a door leading from the rear portion of the shop exited into an alley.

Chicago Police Officer John Bosquette testified that on

January 11 he and other police officers went to the basement of a house at 4151 South Langley Avenue. Through a window he observed defendant wearing a revolver in a holster on his side. Defendant was arrested and taken to the police station. The revolver taken from defendant was that identified by Owens as the weapon which he had kept in his office desk drawer. When questioned about the robbery defendant was asked what he had done with the money he had obtained from Owens. In response he took his wallet from his pocket and said, "This is all I have got left of it." The witness stated that defendant was in possession of no policy slips when arrested.

Earl Cooke, a CTA bus driver, testified that he stopped to visit his friend Owens at the barber shop at about 6:45 on the day in question. Owens was retiring for the day and went to the office at the back of the shop. The witness followed Owens to speak with him. Owens was standing in the office doorway and defendant held a revolver pointed at Owens. Defendant told witness that he should come on over and that this was a stickup. At this time Owens told defendant, "You won't get hurt, go ahead out the door, put on your coat and go out the door." Defendant then put on his coat and left through the front door.

Defendant testified in his own behalf. He stated that he was a maintenance man and porter and made a little side money writing policy. On January 10, 1963, he went to work at about 3:45. He worked for a time and then Ramey repaid him two dollars that he had paid out of his own pocket on a policy overhit. About 5:00 P.M. he went to the office at the back of the shop to speak with Owens. Owens gave him a revolver and \$110 which he was told to use to pay to people at certain addresses. Defendant did not make the payments as instructed but instead spent the money. He called Owens the following day on the telephone and told him that he had spent the money but would repay it and return the revolver.

Owens told him that the police had been informed that defendant had committed a robbery and a warrant for his arrest had issued. Defendant testified that he said, "James, you know there wasn't a robbery. Why do you want to put a robbery on me?" Defendant also testified that Mr. Gray and Mr. Swan knew of the policy operation conducted in the barber shop and that Swan sometimes played.

In rebuttal the State called three witnesses.

Thomas Swan testified that he was the shoe repairman in the shop at 5917 South State Street. He had no knowledge that any policy or numbers game had ever been operated from the shop. He also stated that Owens and Ramey were his good friends.

Willie Gray testified that he worked as a barber in the shop operated by his friends Owens and Ramey. He had no knowledge of any numbers game being operated from the shop.

Police Officer Bosquette stated in rebuttal that he searched defendant on January 11, 1963 and did not find policy slips, numbers tickets or a list of names and addresses.

Defendant's sole contention is that the trial court erred in not directing a verdict for the defendant at the close of all the evidence. Defendant argues that the State's evidence is rendered incredible by "inconsistencies and statements which denied the existence of common sense." It is contended that the evidence indicating that defendant robbed Owens of \$113 but took nothing from any of the several other persons or the cash register located in the front of the shop is not believable. Similar assertions of incredibility are made relating to the evidence that though defendant had access to the shop at all times, including days when it was closed, he chose to rob it in the presence of numerous witnesses; that defendant left the shop through the front door though he would have been less conspicuous going through the side door; that only one unidentified police officer, who stayed only ten minutes and talked only with Owens, came to the shop immediately after the robbery but after Owens called the following day seven

officers came to investigate; that in the unsuccessful search for defendant shortly after the robbery on January 10, Owens drove about the neighborhood with Cooke and the police officer but did not go to defendant's residence; and finally that it was approximately 29 hours after the robbery was said to have occurred when Owens went to the police station and signed a complaint against defendant. Defendant also suggests that it is significant that the witnesses against him admitted to having been friends of long standing.

It is further argued by defendant that these questioned elements of the evidence against him are made understandable by acceptance of his own testimony to the effect that he was given the money and Owens became upset only after he learned on January 11 that defendant had misused it. As a general principle, it is true beyond question that the credibility of the witnesses is primarily a function of the trial court, and its conclusions in regard thereto will not be disturbed on review. We believe, however, that this case falls in that small category of cases in which it becomes our duty to reverse on that very point.

We quote from People v. Pellegrino, 30 Ill.2d 331, 334, where the court said:

The trial judge's finding on the credibility of the witnesses is entitled to great weight, but it is not conclusive and we will reverse a conviction where the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt. (People v. Butler, 28 Ill.2d 88; People v. Bartley, 25 Ill.2d 175; People v. Jefferson, 24 Ill.2d 398.)

We find the State's evidence so improbable and unsatisfactory as to require reversal of defendant's conviction.

Reversed.

ENGLISH, P.J. and DRUCKER, J., concur.

55594



1 3 I.A.³ 480

MAR 20 1972

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

) Appeal from the Circuit

) Court of Cook County.

v.)

) Alvin A. Turner, M.

RAYMOND HUNTER,)

) Defendant-Appellant.)

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Raymond Hunter was charged with arson, aggravated assault, aggravated battery and attempt murder. At a preliminary hearing to determine probable cause the State moved to reduce the felonies to misdemeanors. The court stated that inasmuch as the defendant was pleading not guilty the charges would not be reduced. The court, the defense and the State proceeded on the understanding that a preliminary hearing was being held.

The aggravated battery and attempt murder complaints were heard first. At the close of the evidence the attempt murder charge was stricken with leave to reinstate. The State then made a motion to treat the aggravated battery charge (which arose from the same act as the attempt murder) as a misdemeanor. The court agreed, found Hunter guilty of aggravated battery and announced: "Plea of not guilty, jury waived, finding of guilty."

The defendant's attorney protested that he understood a preliminary hearing was being conducted on the complaints and pointed out that a jury had not been waived. After some discussion the court declared: "I am not going along with that. Plea of not guilty, finding of guilty. Any suggestion as to the penalty?" The State recommended a year in the House of Correction and the court imposed that sentence. After this, the State struck off with leave to reinstate the arson and aggravated assault complaints.

The defense attorney requested a hearing in aggravation and mitigation and asked if the court did not want to know the defendant's background before sentencing him. The court responded: "I don't think so." The attorney protested and the court replied: "I think he is getting away with murder as it is." The attorney asked that an appeal bond be set. The court replied: "No, I won't set any appeal bond. Let him go to jail."

The defendant was deprived of his constitutional right to a jury trial and denied his statutory right to a mitigation hearing. Despite the court's statement that a jury was waived, the record shows that the defendant was never informed of his right to a jury trial and that neither he nor his counsel waived that right. A jury waiver cannot be presumed from a silent record. People v. Rambo, 123 Ill.App.2d 299, 260 N.E.2d 119 (1970).

A hearing in mitigation and aggravation must be held if such a hearing is requested. Ill.Rev.Stat., 1969, ch. 38, para. 1-7(g); People v. Riso, 129 Ill.App.2d 356, 264 N.E.2d 236 (1970); People v. Smith, 62 Ill.App.2d 73, 210 N.E.2d 574 (1965).

Through antecedent motions in this court we learned that the defendant served the sentence imposed upon him. If he had appealed immediately after his trial, his conviction would have been reversed and the cause remanded. Since he has been incarcerated in the House of Correction for one year, his conviction will be reversed without remandment.

Reversed.

McNamara, P.J., and McGloon, J., concur.



3 I.A.³ 492

MAR 20 1972

54428)
54429)

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
ALVIN JOHNSON and JOSEPH ELLIS,	)	HONORABLE
	)	RICHARD J. FITZGERALD,
Defendants-Appellants.)	)	PRESIDING.

ABST.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Alvin Johnson and Joseph Ellis were charged with the offense of arson. Following a bench trial they were found guilty and were each sentenced to a term of nine to twelve years. Defendants raise three points on appeal: (1) they were not proven guilty beyond a reasonable doubt because corpus delicti was not established; (2) the evidence did not prove beyond a reasonable doubt that they were the perpetrators of the arson; and (3) the minimum sentence imposed by the trial court was excessive, amounting to a determinate sentence and should be reduced.

EVIDENCE

Testimony of Benjamin Davenport, called by the State:

On the evening of October 13-14, 1968, he was employed as a security guard at the Gold Coast Lounge located at the southeast corner of State and 57th Streets in Chicago, Illinois.

At about 10:00 P.M. he noticed the defendant Ellis "walking up and down, looking in the window [front window of the lounge on the State Street side]." He observed this behavior until the fire started.

At about 1:15 A.M. on the same evening he was sitting in the rear (southeast) portion of the tavern when he smelled gas and hollered to Cardell Strickland (the bartender and the tavern owner's brother), "I smell gas." He then turned around and saw fire at the rear window. He ran out of the front door, turned

east along 57th Street and then turned south into the alleyway at the rear of the lounge and ran into the vacant lot adjacent to the south side of the lounge. "I seen two fellows running out of the other little gangway in the back. They were running out from where the fire started from. * * *" Upon reaching the vacant lot: "One [defendant] shot by me this way and the other ran by me the other way." They passed within 15 to 18 feet of Davenport.

After the defendants passed him he hollered to Strickland to stop Ellis. Then, "I hollered at him [Alvin Johnson] to stop. And none of them stopped. So I took off after them." Johnson ran south down the alley and Ellis ran west out of the vacant lot. The witness first stated he chased Johnson, then said it was Ellis he chased.

He first said it took about five or six minutes to get around to the rear of the tavern. Then he said, "Immediately I went out when I seen the fire * * * I went right out. * * * I really wouldn't know how long it took. I went out immediately."

He knew both of the defendants prior to the fire and identified them as the individuals he saw running from the fire. Johnson was wearing a short jacket (People's Exhibit No. 1) and Ellis was wearing a brown topcoat and a hat. It was "real light" when he observed the defendants.

After pursuing one of the defendants he returned to the rear of the tavern. There he observed a gas can which had not been there when he emptied the trash at noon. Later a fireman moved the can to the front window.

Right after the fire Ellis came across 75th Street to the front of the tavern wearing the same coat, but no hat. When Ellis was leaving the scene he told Mr. and Mrs. Harron Strickland that if they built up the tavern again he was going to burn it back down.

He later went with Detective Gardner to arrest Ellis.

On cross-examination he denied turning in a fire alarm. He did not draw or fire his revolver. He did not shoot at either of the defendants. After being confronted with his grand jury testimony in which he stated that he did fire a shot, he stated that he fired a shot in the air.

He gave a policeman the names of the two defendants. He told the police at the scene of the fire that Ellis had on a tan coat, a hat, and dark glasses. He then pointed out Ellis and told the policeman, "That's the man." The policeman talked to Ellis and then let him go because they didn't have enough to hold him on. He denied giving the police a more detailed description because he had identified Ellis by name.

On re-direct examination he reiterated that he fired a shot in the air and chased Johnson, not Ellis.

Testimony of Cardell Strickland, called by the State:

He was a bartender at the Gold Coast Lounge on the night of the fire. He knew both defendants prior to the fire. Ellis had been "peeping" in the front window from about midnight until just before the fire. Davenport said, "Bubbles (Cardell Strickland), I smell gas." He looked around and "[a] blaze was coming up," by the window in the rear of the tavern. He saw Davenport run out and say, "Bubbles, go south. Go to the vacant lot and maybe we can catch them back there." The witness went south on State Street. As he entered the vacant lot Davenport hollered, "Bubbles, catch Joe." Joe, [Ellis] wearing a grey coat, passed by him and jumped into a white convertible parked on State Street. Joe passed so close, about three or four feet, he almost knocked him down. It took him at least two or three minutes to get into the vacant lot.

He knew the gas can found at the scene was not behind the tavern before the fire because he checked the back of the tavern regularly.

About 10 or 12 minutes later Ellis returned to the tavern. Cardell told the police, "Arrest that man. That's the man that set the tavern on fire." He told the sergeant he knew it was the man because he passed him running. The sergeant said, "Well that's not enough evidence. We can't arrest him on that." So they let him go.

Ellis came back then and Sam Love, a disc jockey who worked at the lounge, said to Ellis, "Man, why you set the place on fire? Why you do something like that?" Then one word led to another and Ellis said, turning away, "If he builds it up again I'm going to burn it down again."

On about October 16, 1968, the witness pointed Johnson out to police officers who arrested him.

On cross-examination he stated he had known Johnson five or six months and Ellis about a year prior to the fire.

After chasing Ellis, without success, he went across the street and called the fire department. The man running from Davenport was about 30 or 35 feet away and wasn't wearing a hat. The man running to the car, Ellis, had on a hat and a light looking trench coat.

Testimony of Harron Strickland, called by the State:

He is the owner of the Gold Coast Lounge and arrived there about 1:30 on the morning of October 14, 1968. He never gave his permission to anyone to set fire to his lounge. He has known Ellis for 15 or 20 years and Johnson for two years. He heard Ellis tell the police he didn't do it.

He heard Sam Love, the record spinner at the lounge, say, "You know you set fire to this place." Ellis replied, "If you build it back up again I'm going to burn it down again." Mrs. Strickland, Cardell Strickland, the bartender, the waitress, and the porter from the lounge were present during the conversation.

There was a 40 watt light over the back door of the tavern. The alley between Wabash and State is "[a]ll lit up." The alley is 60 feet from the back door. The light shining in the alleyway casts a reflection into the vacant lot adjacent to the tavern. He heard Sam Love say, "Man, you know you set this place on fire," and Ellis reply, "I did not. I was at home."

Testimony of Mrs. Harron Strickland, called by the State:

She arrived at the fire about 1:20 or 1:25 A.M. She has known Ellis since he was a little boy and Johnson quite a few years.

While she was at the scene of the fire she heard her brother-in-law, Cardell Strickland, say, indicating Ellis, "That's the man that burned the place down." Ellis told the police that he wasn't around there, he was not the fellow that burned the place down.

She related the following:

He [Ellis] said very distinctly, as he turned around, after the sergeant said, "We don't have enough on him," he bumped into me and he said, "If you build it up again I'll burn it down again."

Mrs. Strickland also related the following conversation with the defendants which took place on May 29, 1968, at 1:15 in the morning at the Gold Coast Lounge:

Alvin [Johnson] told me he was the king of State Street, and I was supposed to serve whoever he said in my place. And I said, "Well, Alvin, you cannot change the laws. I don't serve anyone under twenty-one."

At that time he told me, he said, "Well, you know Joe Ellis is over twenty-one."

I said, "You don't have to tell me how old Joe is. I know how old he is. I know his mother and grandmother."

But he said, "I say serve anybody I say. If you don't, I'll burn the place down."

I said, "Alvin, you don't mean you will burn the place down for me not serving somebody. You cannot change the laws."

On cross-examination she stated that there is a brick barbecue

pit on the brick patio three or four feet from the rear door of the lounge. The pit was last used on May 30, 1968.

On re-cross examination she stated that the pit was used on the 4th of July and Labor Day but not in August or September, other than Labor Day.

Testimony of George Healy, called by the State:

He has been a Chicago fireman for 15 years and a member of the Bureau of Fire Investigation for 11 years. His duty is the determination of the cause and origin of fires.

He arrived at the scene of the fire at 1:45 A.M. on October 14, 1968. He determined that the fire originated at the rear east door of the tavern. This is based on the intense burning and charring in and around the rear door area and the door jamb itself. He was given the gas can found at the scene and determined it contained gasoline. (There was a stipulation as to the chemical analysis of the contents of the can.) In his opinion the fire was "suspicious" which in the fire fighting trade indicated arson. He observed an "alligator char" at the rear door which results when wood soaked with a petroleum product is intensively burned.

Testimony of John Smith, called by the State:

He testified that he was a cab driver for the Hardin Cab Company. At about five minutes to one on the morning of the fire he had just pulled into the company garage at 56th and State (one block from the fire). He was "gassing up" his cab at five or ten minutes after one when the following transpired:

I heard a voice behind me asking, "Say, I want to get this out of the can, the gas or whatever you have in the can." There was a hole or something already in the can. He started to pour it on the floor.

I said, "Don't pour it on the floor. There is enough gas coming out right now."

He said, "Oh, yes." And he started to leave.

He identified the man in the conversation as Alvin Johnson and stated the substance poured on the floor smelled flammable. The man he observed had a broken tooth - the court noted that Johnson had a broken tooth at trial. He also stated that the can was similar to the one found at the fire. About five or ten minutes after Johnson left he saw the building at 5701 State burning.

He was interviewed by a police officer, whose name he couldn't recall, an hour or two after the incident. He went over to the scene of the fire and related the incident to Harron Strickland who said: "Would you come down and make an identification?" He went to the police station.

Testimony of Officer William Johnson, called by the State:

At about 3:35 A.M. on October 14, 1968, he was interviewing Cardell Strickland at Strickland's house. During that interview Strickland pointed toward two men walking north on State Street and identified one of them as Alvin Johnson. He stopped Johnson who when asked his name replied that his name was Leroy Michelle. He then placed Johnson under arrest.

Testimony of Officer John Finnegan, called by the State:

While Ellis was in custody he searched Ellis' residence at about 3:15 A.M. on October 14, 1968, and seized a tan jacket (People's Exhibit No. 1) lying over the bannister in the hallway.

Testimony of Officer John Finnegan, called by the defense (same officer as above):

He was at the scene of the fire and talked to a number of people including Harron Strickland, Willie Davenport and Cardell Strickland. He gave the following testimony after refreshing his memory from his report:

Mr. Davenport stated he observed the fire at the rear of the building.

He further stated he went across the street and pulled the fire alarm box, and when he came back to the premises he observed one person running from the premises, approximately 135 to 140 pounds, with natural hair, wearing a brown three-quarter length jacket.

He further stated this subject fled in a white Chevrolet parked approximately at 5711 South State Street.

Finnegan further stated that Davenport gave the name of the individual as Joe Ellis. He then stated, "The defendant's name isn't listed on my report in this description from Mr. Davenport."

Ellis arrived at the scene approximately 45 minutes after Finnegan arrived. Ellis said that was the first time he had been at the premises on that particular evening; that he had not been there before that night.

Testimony of Detective Charles Gardner, called by the defense:

He interviewed John A. Smith at the 2nd Police District Station at about four o'clock on the morning of the fire. Harron and Cardell Strickland were present during the interview. Smith's statement was the same as in his own testimony except Gardner asked him if he could remember the man if he saw him again and Smith said he didn't believe he could. In addition Smith described the man as "five seven or five eight, 150 pounds, something like that."

Testimony of James Jenkins, called by the defense:

He has known Ellis about 12 years. He saw Ellis with a fellow named "Texaco" about 20 minutes to one at 55th and Michigan. He then said, "Well, after I found out about the tavern being burned, and that his name was involved, I told him if he didn't do it just go up and talk to Buster [Harron Strickland]." Then Ellis, Texaco, and Jenkins walked up to 57th and State where they saw "firemen and the police putting out the fire." Ellis told them he didn't do it and the three of them left. The witness then went to his grandmother's.

He was unable to recall the name of the tavern in which he was drinking prior to meeting Ellis and Texaco. His house is five miles from Ellis' house, the latter being about two or three blocks from the scene of the fire. He knew it was about 20 to one because he saw his aunt who doesn't get off work until about 12 and it takes 45 minutes for her to get home. Ellis, Texaco and Jenkins got to the lounge before one and the fire was just smoking.

Testimony of Joseph Ellis in his own behalf:

At 12:45 A.M. on October 14, 1968, he was in a poolroom at 56th and State Street. He was with Texaco (Manuel Adams) at the time. Later in the evening he and Texaco met Jenkins at 55th and Michigan. The three of them went to the Gold Coast Lounge. When they arrived there was just a little smoke. He was looking for Harron Strickland and Mrs. Strickland when Cardell Strickland came running out and the following transpired:

Then Mrs. Strickland came running out of the place. They said, "He's [Ellis] the one that did it. He's the one that did it," just like that. So I jumped back and I say, "What is wrong with you all?"

He said, "Yes, he did it. I know he did it. I know he did it."

There was a fellow standing there supposed to be a so-called witness, and he said, "That's not the fellow that did it. He had a cap on and sunglasses and jumped in the car and drove off down the street," and the lady next door stated that.

After this the disc jockey (Sam Love) said, "Okay, if you aint going to jump on him I'm going to jump on him [Ellis] for burning up the place." Ellis said, "You too, you big so and so?"

A police officer grabbed him and he told him, "Wait a minute, officer. Let me talk to these people." The officer let him go and he started talking to them. He then left with James and Texaco.

He has been going into the Gold Coast Lounge since he was

16 years old and he was served liquor ever since then.

On cross-examination he testified as follows: He was in the poolroom with Texaco, "Maybe a half hour * * * from a quarter to twelve, eleven-thirty to about a quarter to twelve." They left the poolroom and proceeded "toward 55th and Michigan and State Street." Ellis knew they left the poolroom before midnight because the poolroom closes at 12:00 o'clock on Sunday. The door was locked and someone was letting people out when they left the poolroom. They then went to 55th and State. He and Texaco were together most of the day and had been drinking that night. When they left the poolroom they went to 55th and State to get some alcohol. It took them four or five minutes to walk to Michigan from State Street. Texaco then went across the street to the Expressway Lounge at about 12:15. He came out after about two minutes. Then James came up and Texaco explained to James what happened. James and Texaco said, "You better go on down there now if you didn't do it."

Then they went up to where the fire had started. This was after one o'clock. Ellis and Texaco drank from 12:15 until they met Jenkins about one o'clock. Texaco came out of the Expressway Lounge at 12:30 and told Ellis someone inside said he was accused of setting the fire up on 57th Street.

He was peeking in and out of the window of the Gold Coast Lounge between 12 and one o'clock in the morning while Texaco was in the poolroom. He was wearing the brown coat (People's Exhibit No. 1) which the police seized on the night of the fire. He was wearing sunglasses, but no hat. He is five feet ten inches and weighed 175 pounds on the night of the fire. He does not own a car and his mother owns a black 1968 Oldsmobile. He does not have a driver's license.

Testimony of Alvin Johnson in his own behalf:

At 12:15 A.M. on October 14, 1963, he was at the 48th Street Police Station, in the lockup. He was arrested earlier at a tavern called Jack's Back Door (hereafter Jack's). Jack's is located at 59th and State Street. He was in police custody from 12:30 that night until 10:30 in the morning. He was wearing a black Italian knit and no jacket that night. He is five feet eight inches and weighed 150 pounds at the time of the fire.

Testimony of Claude Broadnax, for the State in rebuttal:

On the night of the fire he went to Jack's at 3:15 A.M. to close up for the night. When he arrived Johnson was causing a disturbance at the bar. The police arrived at 3:20 A.M., after being summoned, and took Johnson into custody. Jack's is located two blocks from the scene of the arson.

Opinion

The defendants first contend that they were not proven guilty beyond a reasonable doubt in view of the prosecution's failure to establish the corpus delicti - the burning of a building and a person criminally responsible for the fire (human agency).

The defendants argue, based on Healy's testimony, that there was no showing in fact that the fire was caused by a human agency, only that it was suspicious or possible.

In support of this contention defendants cite People v. Lueder, 3 Ill.2d 487, and People v. Hougas, 91 Ill. App.2d 246. Both of these cases dealt with the rule that a confession alone is not sufficient proof of arson for a conviction. In both cases there was no evidence of human agency other than a confession. In the case at bar there is no confession but there is evidence of human agency.

The State presented the following evidence of human agency: an empty gas can containing hydrocarbons similar to kerosene, a

flammable substance, found at the rear door of the tavern; Davenport's and Cardell Strickland's testimony that the can was not there earlier in the day; Davenport's testimony that he smelled gasoline just prior to the fire; and Officer Healy's testimony, particularly the discussion of "alligator" char as an indication that the wood at the rear door was soaked with a petroleum product and his explanation of what he meant in stating his opinion that the fire was of "suspicious" origin.

In assessing whether the evidence established the corpus delicti we note that "[d]irect and positive evidence is unnecessary to prove the corpus delicti * * * ." People v. Lueder, supra, at 488. The evidence indicates that gasoline was applied to the rear door of the Gold Coast Lounge, that gasoline was not stored there, and that the gasoline was subsequently ignited. The conclusion that the fire was caused by human agency is supported by the evidence.

Defendants' second contention is that the evidence did not prove beyond a reasonable doubt that they were the perpetrators of the arson because of inconsistencies in the testimony of several witnesses and the alleged weakness of the eyewitness identification.

Davenport did state that he chased Ellis and then said it was Johnson. He testified that it took him five or six minutes to get to the back of the tavern but then stated: "I really wouldn't know how long it took. I went out immediately." After testifying that he did not fire a shot, Davenport admitted that he fired a shot in the air.

We held in People v. Carpenter, 71 Ill. App.2d 137, 145, that:

Slight discrepancies in the testimony of the witnesses do not render that testimony unworthy of belief. People v. Williams, 28 Ill2d 53, 190 NE2d 796. In a bench trial it is the function of the trial court to determine the credibility of the witnesses and the weight to be afforded their testimony. People v. Clark, 30 Ill2d 216, 195 NE2d 631.

Davenport also testified at trial that he did not turn in the fire alarm. Officer Finnegan, after refreshing his memory from his notes, stated that Davenport had told him that he turned in the fire alarm. Cardell Strickland testified that he summoned the fire department. Finnegan also testified that he had written down "everything pertinent" and was not sure what was said. It should be noted that Finnegan attributed the following acts to Davenport: pulling the fire alarm box, chasing an individual who fled in a white Chevrolet parked on State Street, and identifying the defendant in question as Ellis. This matches the testimony of Cardell Strickland, not Davenport. Finnegan spoke to both Davenport and Strickland.

The defendants claim that Cardell Strickland never had the opportunity to see Ellis. However, Strickland testified that he had known Joe Ellis for a year prior to the fire and that he had seen Joe looking in the front window of the tavern around midnight of the night of the fire. Ellis admitted he was peeking into the tavern between 12 and 1:00 o'clock.

Defendants argue that there was not sufficient light for Davenport or Strickland to identify the defendants. Davenport testified that it was "real light." Harron Strickland testified that there was a 40 watt bulb over the rear door of the tavern which "lights up that whole areaway there * * *." The alley and State Street are also lighted. We would further note that the fire was burning at the time the identification took place.

The State produced other evidence linking the defendants to the arson. The State presented the testimony of Smith, the cab-driver, who stated that he saw defendant Johnson shortly before the fire at a cab station located only a block or two away from the Gold Coast Lounge. Defendant was holding a can which contained a fluid that smelled like gasoline. Smith stated that the gas can

he saw Johnson holding looked similar to the gas can later found at the rear door of the lounge. There was the testimony of Cardell Strickland and Davenport about Ellis "peeping" in the window, placing him at the scene of the crime. Ellis admitted this.

We note also the prior threats to Mrs. Strickland which are highly relevant in an arson case. The court in Carlton v. People, 150 Ill. 181, discussing evidence in arson cases, stated at page 187:

The previous threats of the defendant, and his declarations in the nature of threats, were, on the same principle, properly admitted. While they are not of themselves convincing of guilt, from them, in connection with the other circumstances, if believed by the jury, guilt may be a logical sequence.

Each of the defendants asserted that he was not at the fire and testified in his own behalf. Ellis' alibi was replete with errors and inconsistencies as to time and place. Johnson's alibi was refuted by a credible, disinterested witness.

The crime of arson is by its nature secretive and difficult to prove. In People v. Wolf, 334 Ill. 219, 230, the court stated:

It is seldom that the crime of arson can be established by direct and positive testimony of witnesses who actually saw the fire set. The inference of guilt must be drawn in most cases from circumstances satisfactorily proved. A court of review should not disturb the verdict of a jury unless the verdict appears to have been the result of passion or prejudice or unless the evidence is so unreasonable, improbable or unsatisfactory as to warrant a reasonable doubt of guilt.

The evidence of the prosecution in the case at bar is not improbable, unconvincing or contrary to human experience. On the contrary, the State's case in view of all the evidence has few inconsistencies and none amounting to a reasonable doubt of defendants' guilt.

Defendants also claim that the State's failure to call a Ben Lewis raises the inference that his evidence was unfavorable to

the prosecution's theory of the case. Strickland testified that a person whose name he thinks was Ben Lewis told him he had seen Ellis at the tavern before the fire and that he saw "them" leaving the rear of the place. The State is not obligated to present every witness to a crime (People v. Jones, 30 Ill.2d 186, 190) and under all the circumstances and in view of the lack of specificity of time or identity we cannot find that the failure to produce Lewis gave rise to the presumption that his testimony would have been unfavorable to the State.

Defendants' final contention is that the minimum sentence imposed by the trial court in the case at bar was excessive, amounting to a determinate sentence and should be reduced.

In People v. Miller, 33 Ill.2d 439, 444, the court set forth the test for determining whether a sentence is excessive:

Where it is contended that the sentence imposed in a particular case is excessive, though within the limits prescribed by the legislature, we will not disturb the sentence unless it clearly appears that the penalty constitutes a substantial departure from the fundamental law and its spirit and purpose, or that it is not proportioned to the nature of the offense. (People v. Smith, 14 Ill.2d 95.)

In the case at bar the defendants deliberately set fire to a building that at least one of them knew contained 30 or 40 people. They both threatened to burn the tavern if it was rebuilt.

We find no reason to disturb the sentences. For the foregoing reasons the convictions and sentences are affirmed.

AFFIRMED.

Lorenz, P.J., and English, J., concur.

Abstract only.



MARY LOU LOUGHLIN,
Plaintiff-Appellee,
vs.
WILLOW FARMS, INC.,
Defendant-Appellant.

HONORABLE
WALLACE KARGMAN,
PRESIDING.

AN, ABST.

GOLDBERG, P.J. and BURKE, J., concur.

MAR 20 1972

54233

ABST.

WEST HIGHLAND SAVINGS & LOAN
ASSOCIATION,

Plaintiff-Appellee,

VS.

HOWARD W. WITTNER, et al.,

Defendants-Appellants.

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. George E. Dolezal,
Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Summary judgment for \$1,989.76 was entered by the Circuit Court of Cook County in favor of West Highland Savings & Loan Association (plaintiff) against Howard W. Wittmer and Lorraine E. Wittmer (defendants). A motion by defendants to vacate the judgment was denied. Defendants appeal.

It is agreed that defendants had obtained a mortgage loan from plaintiff. On August 25, 1967, at the request of defendants, plaintiff issued a so-called payoff letter stating the entire balance due as being in the amount of \$10,449.81. The affidavits filed in support of plaintiff's motion for summary judgment, together with supporting exhibits, show that an error was made and that tax payments actually made in connection with another mortgage loan, bearing an identifying number similar to defendants' loan, were debited against defendants' account. This left a negative balance in the account. This error was discovered; but, instead of replacing the debited amount in the tax and insurance escrow account, the amount was credited against principal due from defendants. Because of these errors the letter of August 25, 1967 erroneously stated the net amount due plaintiff. The difference caused by the errors is \$1989.76, which the trial court found due plaintiff.

The judgment was based upon supporting affidavits made by two officers of plaintiff and accompanying authenticated copies of portions of plaintiff's accounting records. No counter-affidavits were filed by defendants. Defendants filed only an affidavit in support of their motion to vacate the summary judgment. In this affidavit, they depended solely upon the fact that plaintiff's complaint alleges that the parties "adjusted accounts" on September 20, 1967, whereas the letter issued by plaintiff was dated August 25, 1967. The counter-affidavit states that on September 20, 1967 no discussions were had between defendants and any representative of plaintiff and no adjustments of account were made that day. It is undisputed, however, that although the payoff letter was dated August 25, 1967, payment of the amount therein requested was not made to plaintiff until September 20, 1967. Plaintiff properly regards this date of payment as being the date upon which the accounts were actually stated and closed between the parties. Thus, the counter-affidavit fails entirely to meet the issue raised in plaintiff's motion for summary judgment.

In considering the merits of this situation, the principle is clear that summary judgment should be granted only where the whole record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ill.Rev.Stat. 1969, ch.110, par.57(3); *Saghin v. Romash*, 122 Ill.App.2d 473, 478; *American National Bank & Trust Co. v. Lembessis*, 116 Ill.App.2d 5, 10.

In the case at bar, defendants failed to file counter-affidavits in opposition to plaintiff's motion for summary judgment. The affidavit submitted in support of their motion to vacate the summary judgment completely disregards the merits

of the situation which are meticulously set forth in detail in the supporting affidavits and accounting records supplied by plaintiff. Under these circumstances, the material facts properly set forth in the affidavits and other material tendered by plaintiff stand admitted. *Glen View Club v. Becker*, 113 Ill.App.2d 127, 136; *Kitzer v. Rice*, 90 Ill.App.2d 72, 79. In addition, we cannot overlook the established principle that an account stated is conclusive but open to correction where mistake or fraud is shown. *Korziuk v. Korziuk*, 13 Ill.2d 238, 243; *Wolford Morris Sales, Inc. v. Weiner*, 75 Ill.App.2d 238, 250.

The record here shows that there was a unilateral mistake of fact as a result of which plaintiff received less than the amount to which it was justly entitled. To deny plaintiff relief under these circumstances would constitute an unjust enrichment of defendants. The record shows that no genuine issue of material fact exists with reference to the errors as contended by plaintiff. Plaintiff was entitled to judgment as a matter of law. We accordingly find that the summary judgment was properly entered in favor of plaintiff and it is affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.



3 I.A.³ 500

56209

ABST.

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
RONALD C. COLE,	)	Hon. Louis B. Garippo,
	)	Presiding.
Defendant-Appellant.)	

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Ronald C. Cole, defendant, was indicted for possession of heroin. Ill.Rev.Stat. 1969, ch.38, par.22-3. The public defender of Cook County was appointed as his counsel. He pleaded not guilty. On motion for discovery, he was provided with a list of witnesses. A motion to suppress physical evidence was duly filed and heard by the court. This motion was denied. On October 31, 1969, after complete and proper explanation by the court, defendant waived trial by jury and executed a written waiver. A stipulation was entered into in open court that the evidence already heard on the motion to suppress be considered as evidence in the trial. It was also stipulated that a substance of which defendant had possession was heroin, according to a test performed at the Chicago Crime Laboratory. The court entered finding and judgment of guilty and defendant was sentenced to the penitentiary for a term of from two years to two years and one day. Defendant appeals.

On August 24, 1971, the public defender filed a motion for leave to withdraw as attorney for appellant. In a supporting brief, counsel set forth that the motion was made pursuant to *Anders v. California*, 386 U.S. 738, 13 L.Ed.2d 493, 87 S.Ct. 1396. The public defender raised two points as being the only

possible bases for appeal. The brief cited authority to demonstrate the unavailability of these contentions. Proof of service appended to the motion shows that copies of the notice, motion and affidavit were mailed to defendant at the penitentiary on August 23, 1971. On September 13, 1971, at the request of this court, its administrative assistant wrote a letter to defendant advising him of the pendency of the motion and of the service thereof. The letter further advised defendant that the court had given him until November 12, 1971 to file any points that he might choose in support of his appeal; and that, after this date, the court would make a full examination of the proceedings and determine whether the appeal is frivolous. This letter also advised defendant that if the court found no merit in the appeal, counsel's request to withdraw would be granted and the judgment affirmed; but, that, if the court deemed any legal points raised to be arguable on their merits, other counsel for the defendant would be appointed before proceeding. No pleadings or memoranda of any kind have been received by this court in response to the notice sent by the public defender or the letter sent by the court.

The first question pointed out by the public defender is sufficiency of the jury waiver. The record shows that the counsel for defendant in open court advised the judge that defendant wished a bench trial. The record further shows that the court then asked three questions. Defendant was asked if he realized that his attorney had indicated that he desired a bench trial; if he realized that he had a constitutional right to have a jury determine his guilt or innocence and whether he was willing to waive trial by jury and have his guilt or innocence determined by the court. In each case, defendant responded affirmatively. He then signed a jury waiver which was tendered to the court by

his counsel. In *People v. Collins*, ____ Ill.App.2d ____, 270 N.E.2d 226, this court approved a jury waiver under virtually identical circumstances. The court cited *People v. Sailor*, 43 Ill.2d 256 and *People v. Adorno*, 126 Ill.App.2d 98. We find no merit in this contention.

The second point raised by the public defender is directed to the contention that the sentence imposed, of two years to two years and one day, is not properly indeterminate. That argument is meaningless here. Defendant was sentenced under a statute which provided a minimum sentence of two years in the penitentiary for possession of heroin. Ill.Rev.Stat. 1969, ch.38, par.22-40(6). Consequently, this sentence was the absolute minimum applicable to the finding of guilt.

We have examined fully all of the proceedings as required by Anders. We conclude that the appeal lacks merit and is frivolous. The motion of the public defender for leave to withdraw as defendant's counsel is granted and the judgment of the trial court is affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.

3 IA³ 547
MAR 20 1972

ABST.

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
vs.) CIRCUIT COURT,
ELMORE McLEMORE,) COOK COUNTY.
Defendant-Appellant.) HON. DANIEL J. RYAN,
Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

On February 13, 1968, Elmore McLemore, the defendant herein, and Alphonso McLemore, his brother, were jointly indicted for having committed the crimes of rape, armed robbery and indecent liberties with a child. Upon pleading guilty to the rape counts of the indictments, Alphonso McLemore was convicted and thereafter sentenced to a term of not less than four nor more than ten years in the penitentiary. Defendant, having pleaded not guilty and being tried without a jury, was found guilty of the crimes as charged and thereafter sentenced to two concurrent terms of not less than five nor more than twelve years in the penitentiary.

In prosecuting this appeal, defendant has raised two contentions. He urges that his in-court identification was the product of an inherently suggestive confrontation and should therefore have been suppressed, and that the evidence presented at the trial did not establish his guilt beyond a reasonable doubt.

It appears from the record that prior to his trial, defendant moved to suppress the testimony and evidence of the identification viewing which took place at the Robbins Police Station. At the hearing on that motion to suppress, the defendant testified that on the night of January 11, 1968, he, along with his father and brother went to the Robbins Police Station at the request of Officers William C. Evans and Gerald Mc Cline. These officers advised defendant of

the fact that Mrs. Johnnie Mae Kramer and her daughter, Maxine, had accused him of rape.

Defendant testified that upon arriving at the police station he was directed to a room where he was confronted with Mrs. Kramer and her daughter, Maxine Love. It appears that the persons who were present in this room at that time were the defendant, his brother, Mrs. Kramer, her daughter, Officer Evans and Police Chief Aaron Stout. According to defendant, Mrs. Kramer looked at him and stated that he was not the one. Defendant further testified that he was allowed to leave the room and that while standing in its adjacent hallway, he overheard Officer Evans say to Mrs. Kramer, "Don't be scared, that is him, identify him." Shortly thereafter, Mrs. Kramer allegedly approached defendant, smelled him and identified him stating, "I know him by smell. I know that cologne."

Defendant stated that he had seen Mrs. Kramer and her children on numerous prior occasions due to the fact that they were neighbors residing only two or three houses down the street.

When Mrs. Kramer was called to testify, she stated that while at the Robbins Police Station, she identified the defendant upon seeing him. This witness further stated that although the viewing aided her in identifying the defendant, she would have been able to make the identification without the confrontation, due to the fact that she had known him since he was young. The record indicates that Mrs. Kramer informed the police of the identity of her assailants prior to having viewed them at the station. At the conclusion of the hearing, the motion to suppress was denied and the following was subsequently brought out at the trial.

On January 11, 1968, the complainant, Johnnie Mae Kramer resided with her husband, children and brother at 13832 South Troy,

Robbins, Illinois. At about 10:30 that evening, and while watching television in her bedroom with three of her children, she observed a man standing in the doorway to her room holding a gun. This individual, threatening that he would kill her, told her to holler and then proceeded to have sexual intercourse with her. Shortly thereafter, this assailant left the room, returned, and again had sexual relations with her. Although it appears that during the course of these events, the only light in the bedroom was that cast by the television, Mrs. Kramer testified that as she looked up from her bed and observed a person standing in the doorway, she was able to recognize him as Elmore McLemore. According to the record, after defendant sexually assaulted Mrs. Kramer, he told her and her children to lie down on the dining room floor. Mrs. Kramer testified that while lying on the floor, she was able to see the defendant turn the bedroom light on and proceed to tear up the room and take a hi-fi, a shotgun and some money.

When Alphonso McLemore entered the dining room, he ordered Mrs. Kramer to the bedroom, raped her and then told her to return to the dining room. Mrs. Kramer testified that while she was in the bedroom with Alphonso, Elmore McLemore was in the living room with her daughter. The record indicates that these men entered the Kramer residence at approximately 10:20 P.M., and remained approximately forty minutes.

Maxine Love was called to testify on behalf of the prosecution. She stated that she was watching television in the living room of her home when she observed her younger brother, Maurice, enter the house followed by two men. This witness testified that she believed one of these men to be a person named Charley, and therefore, ran to him and embraced him. When this person whom she believed to be

Charley, put a gun to her face and ordered her to her mother's room, she realized that she had made a mistake as to this individual's identity and was then able to recognize him to be Elmore McLemore. Miss Love further testified that she knew defendant as the result of being neighbors and occasionally seeing him on the street.

The record indicates that while defendant was in the bedroom having intercourse with Mrs. Kramer, Alphonso McLemore called Miss Love to the dining room, covered her head with a pair of trousers and forced her to have intercourse with him. Shortly thereafter, according to Miss Love, the defendant raped her. Miss Love further stated that although the trousers which covered her head prevented her from actually seeing the defendant, she knew that it was Elmore raping her, as the result of hearing and being able to identify his voice.

On cross-examination, this witness stated that in addition to the light cast by the television in the living room, there was also a light burning on the porch immediately outside the living room door.

Maurice Love, one of Mrs. Kramer's children, testified that he knew the defendant and that on the evening in question while walking home, the defendant put a gun in his back, pushed him into the house and ordered him to go to his mother's room. This witness further testified that he went to his mother's room and was then told to go to the dining room and lie on the floor. Maurice Love stated that during that time, defendant was in bed with Mrs. Kramer. When Elmore came out of the bedroom he went to the front room and raped Miss Love. On cross-examination, this witness testified that he had seen the defendant on numerous occasions prior to the night in question and that there was no possibility of his being mistaken as to the defendant's identity.

Alphonso McLemore was called to testify on behalf of the defense. He stated that he was one of the men who had perpetrated the acts complained of but that his brother Elmore was not. This witness went on to state that a person named Jimmie Lee Westbrooks was his accomplice at that time. When Westbrooks was called to testify, he stated that on the night in question, he was with Alphonso McLemore in the home of the complainants. He further stated that Elmore McLemore was not present at that time.

Curtis Brook was also called to testify on behalf of the defense. He stated that on the evening of the 11th of January 1968, between the hours of 11:30 and 12:00, he saw Alphonso and Westbrooks together. He further stated that one was carrying a radio and the other a shotgun, and that Elmore McLemore was not with them at that time.

From the record it does not appear that defendant's identification was the product of, or tainted by the confrontation at the police station. The record clearly indicates that during the time that the assailants were in the Kramer residence, there was more than an ample opportunity for Mrs. Kramer and her children to see, observe and identify the defendant.

Mrs. Kramer testified that she immediately recognized the defendant upon seeing him standing in the doorway to her room. Although the only light in that room was that cast by the television, this does not preclude her being able to make an accurate identification, for as Mrs. Kramer also stated, she was able to see the defendant when he turned the bedroom light on. Furthermore, Maurice Love testified that he observed the defendant at the time they entered the house and that he had also seen him on previous occasions. The fact that this witness was only nine years

of age at the time of the occurrence does not, as defendant would have us believe, preclude the court from considering his testimony. This witness, having stated that he understood the nature of the oath and having otherwise demonstrated his ability to receive correct impressions, to recollect and narrate intelligently, was properly allowed to testify. *People v. Davis*, 10 Ill.2d 430.

In addition to the testimony of Mrs. Kramer and her son, Maurice, Maxine Love also stated that she was able to identify the defendant as one of the men who raped her. As stated supra, she recognized him when he put the gun to her face and she recognized his voice as he raped her.

That defendant's identification had an origin independent from the custodial confrontation is supported by two other significant factors. First, it is undisputed that the defendant and the complainants' family knew each other as the result of being neighbors residing only two or three houses down the street. See *People v. Davis*, 45 Ill.2d 514. Second, it is also important to note that Mrs. Kramer advised the police of the identity of her assailants prior to the viewing.

It is the rule that where an in-court identification has a source independent from a highly suggestive out-of-court confrontation, the in-court identification will not be suppressed. *People v. Blumenshine*, 42 Ill.2d 508. In view of the foregoing facts which appear from the record, it is our opinion that the state more than adequately satisfied its burden of establishing that the out-of-court identification did not taint or otherwise have any bearing upon his in-court identification.

The final contention which defendant has raised is that he was not proved guilty beyond a reasonable doubt. The basis of this

contention is twofold in nature. First, it is contended that the testimony relating to his identification was vague, uncertain and doubtful. In support of this contention, defendant has called our attention to two inconsistencies found in Mrs. Kramer's testimony and also to the fact that her daughter, Maxine, had initially thought him to be someone else. Defendant further contends that the trial court erred in ignoring the testimony of the witnesses who testified on behalf of the defense.

It appears that there were two statements made by Mrs. Kramer at the hearing on the motion to suppress which differed from the testimony which she gave at trial. At the hearing she denied ever having smelled the defendant while at the police station. At the trial, she testified to the contrary. Furthermore, at the hearing she testified that she had known the defendant since he was young, but at the trial she stated that she had seen him once or twice before. In view of the fact that defendant testified to knowing Mrs. Kramer and her children and being neighbors residing only a few doors down the street, it will suffice to say that the inconsistencies which defendant complains of are inconsequential and do not warrant discounting her testimony. The same is true with regard to Maxine Love's mistaken belief that defendant was a person named Charley.

The second contention which defendant has raised in support of his reasonable doubt argument is that the court erred in ignoring the testimony of those witnesses who testified on his behalf. We can only state that there is nothing in the record which would indicate that this testimony was ignored. The lower court's finding of guilt merely demonstrates the fact that the trial judge chose not to believe it. As this court stated in *People v. Young*, 65 Ill. App.2d 185 at 192:

"Here, the determination of the credibility of these witnesses and the weight to be accorded to their testimony was committed to the trial judge. He saw and heard the witnesses and we cannot say he was not warranted in discounting the alibi evidence."

For the reasons stated the judgment is affirmed.

AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

3IA³559

71-35

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABSTRACT

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
January 24, 1972 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED

No. 71-35

JAN 21 1972

HOWARD K. KELLEY, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PAT HOSNA and HERMAN VALENCICH, d/b/a)	
HOSNA & VALENCICH BUILDERS,)	
)	
Plaintiffs-Appellees,)	
vs.	)	Appeal from the Circuit
	)	Court of the Nineteenth
CHARLES A. WHITE, JEANETTE G. WHITE,	)	Judicial Circuit, Lake
and THE FIRST NATIONAL BANK AND TRUST	)	County, Illinois.
COMPANY OF BARRINGTON, a national)	
banking association,)	
)	
Defendants-Appellants.)	

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Pat Hosna and Herman Valencich, d/b/a Hosna & Valencich Builders, sued to foreclose a mechanic's lien. The action was based upon an alleged partly written and partly oral contract for the construction of a residence for the defendants Charles A. White and Jeanette G. White. The trial court, after a bench trial, rendered a judgment in favor of the builders and against the Whites and decreed a mechanic's lien in the amount of \$8,599.05 (subject to the prior lien of the defendant, The First National Bank and Trust Company of Barrington, the holder of the mortgage on the premises).

Defendants seek a reversal of the decree and a remand for a new trial, claiming, first, that the amount of the judgment is against the manifest weight of the evidence.

The written contract provided for a construction price of \$11,000.00, plus or minus \$1,000.00, depending on the cost of materials.

The heating system and duct work, the electrical work, and a well and pump were excluded from the written agreement and amounted to substantial "extras". There was also evidence of changes made in the specifications of items included in the written contract, resulting in extra costs. There is evidence that the owners and their architect-who testified that he was on the job site at intervals during the course of the entire construction-were aware that the "budget" planned for the home was being exceeded. While the owners were unhappy with this result, the record fairly shows their assent to the changes and inclusions which resulted in the increased cost. We think the record also contains evidence that the home was completed in accordance with the contract except for items which were cut from the contract by mutual agreement of the parties. The trial court found that payment had been made to plaintiffs or their sub-contractors in the amount of \$33,117.41 and that the sum of \$8,599.05 was due plaintiffs under the written agreement and subsequent oral agreements for extras. We have determined from an examination of the full record that while there is some conflict in the evidence, we cannot say that the findings of the trial court are against the manifest weight of the evidence. We therefore sustain the trial court on this issue. See Hall v. Pittenger, 365 Ill. 135, 136 (1937); Rude v. Seibert, 22 Ill.App. 2d 477, 483 (1959).

Defendants also argue that the court failed to rule on their counter-claim for damages based upon the alleged refusal of plaintiffs to complete the construction. The decree does not support this contention. The court found that plaintiffs had complied with all of the terms and provisions of the agreement and denied the allegations of the counter-claim.

Defendants also attack the validity of the decree on several grounds. First, defendants argue that the decree conflicts with

or wrongfully expands what they characterize as a "memorandum judgment" entered by the court after the hearing. The record discloses that on June 18th, 1970, the trial court filed a document entitled simply "Memorandum", in which the court referred to the taking of evidence on June 8th, 9th and 10th and further recited

"Judgment for Plaintiffs in the sum of \$8599.05. Plaintiffs given lien for this amount and receiver appointed. This lien subsequent to lien of First National Bank and Trust Company of Barrington. All as per terms of signed order to be prepared by Narusis & Narusis, Attorneys for Plaintiff. Property to be sold as provided under Mechanics Lien Law if not paid by Defendants."

This is not a judgment order. See Davidson Masonry & R., Inc. v. J. L. Wroan & Sons, Inc., 275 N.E.2d 654 (1971). Also, it is apparent that this Memorandum was not treated by the parties as an order or a judgment since on July 20th, 1970, more than thirty days after the date of the Memorandum, the Whites filed a motion to "correct the decree proposed to be entered"; on July 28th, 1970, the Whites requested special findings of fact; and on July 31st, 1970, they filed written objections to a second proposed decree. Moreover, a motion for a new trial was not filed by the defendants until some two months after the date of the Memorandum with no request for a time extension.

In fact, the Memorandum and the Decree are not inconsistent. Defendants argue that since the decree recites that the proceeds of the sale shall apply against plaintiffs' judgment, whereas the Memorandum notes the superiority of the Bank's mortgage lien to plaintiffs' mechanics lien, there is a conflict. This is specious. The decree specifically finds that the mortgage has priority and incorporates by reference a prior order of June 9th, 1970 which so provided.

The defendants also complain of the failure of the court to make a finding in the decree of the separate value of the land and the improvements and to make other specific findings. Findings of fact are not necessary to support a decree in a chancery action tried without a jury. Ill.Rev.Stat. 1967, ch. 110, par. 64(4). Enhancement of the property by the value of the improvement is not an element of proof when, as here, no attempt was made to sustain the priority of the mechanic's lien over the mortgage lien. Ill.Rev.Stat. 1967, ch. 82, par. 16; Commercial Mortg. & F. Co v. Woodcock C. Co., 51 Ill.App.2d 61, 65 (1964). In this case the court properly found from the evidence that the material, services and labor were delivered and accepted for the residence and constituted a permanent and valuable improvement on the premises. See Ill.Rev.Stat. 1967, ch. 82, par. 7.

Defendants have also argued that the mechanic's lien cannot be sustained because there are unpaid sub-contractors who were not made parties defendant. Defendants made no showing of non-joinder of necessary parties in the trial of the case. Under the Mechanics Lien Act (Ill.Rev.Stat. 1967, ch. 82, par. 11), it will be presumed that there were no other lien claimants. See Burgoyne v. Pyle, 261 Ill.App. 356, 363 (1931); Matot v. Barnheisel, 212 Ill.App. 489, 495 (1919). See also Bingaman v. Dahm, 307 Ill.App. 432, 438 (1940).

The decree of the trial court is therefore affirmed.

AFFIRMED.

GUILD and MORAN, J.J. Concur.



3 I.A.³ 638

MAR 20 1972

55719

LEOTA J. DOWNEY,

Plaintiff-Appellee,

vs.

JOHN ALDEN LIFE INSURANCE
COMPANY,

Defendant-Appellant.

ABST.

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Joseph Hermes,
Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

After trial without a jury, Leota J. Downey (plaintiff) recovered a judgment for \$500 against John Alden Life Insurance Company (defendant). This was predicated upon a weekly benefit hospital policy issued to plaintiff by defendant on September 15, 1966 which provided for benefits of \$100 per week for confinement of the insured to a hospital. Defendant appeals. The facts follow.

On August 13, 1965, plaintiff made written application for the policy upon a printed form provided by defendant. Plaintiff agreed in this application that all answers given were complete and true to the best of her knowledge and belief. She authorized all doctors and hospitals to provide defendant with full information concerning her medical history, condition and diagnosis. In response to a printed question as to whether plaintiff had ever been treated for a variety of specified ailments such as high blood pressure, cancer, etc., she responded affirmatively. She answered negatively the question as to whether she had ever been treated for any disease or disorder of the heart or other specified organs or for any other physical disorder. She responded affirmatively as to whether she had consulted a doctor for any other reason. The form provided

a space for insertion of details regarding questions answered affirmatively. Plaintiff specified here only that she had been treated by a Dr. Zimmerman for removal of a benign tumor and was fully recovered.

It is undisputed, and plaintiff's own testimony shows, that at the end of April, 1966, she was hospitalized for approximately three days by Dr. Zimmerman. The doctor first told her that this was for a heart condition but later told her that it was not. Plaintiff omitted this information from the application. A copy of the application was attached to the policy and made a part thereof. The policy was issued by defendant on September 15, 1966.

Plaintiff was then hospitalized for a heart ailment from August 15, 1967 to September 20, 1967, which was the basis of her claim upon the policy. On October 25, 1967, defendant denied the claim because of withholding of information in the application. Plaintiff was advised that the policy was rescinded and that refund of premiums plus interest would be made.

As the pleadings were originally framed, defendant claimed fraud by plaintiff in obtaining the policy. By amendment, however, defendant took the position that the existence of intent by defendant to deceive was legally immaterial and that liability on the policy could be avoided because of an innocent misrepresentation which would materially affect the acceptance of the risk or hazard assumed by defendant.

This is the single point raised by defendant in this appeal. It is based upon the language of the pertinent statute which provides (Ill.Rev.Stat. 1967, ch.73,par.766):

No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company."

Another portion of the Insurance Code of Illinois provides (Ill.Rev.Stat. 1967, ch.73, par.971a(3)):

"(3) The falsity of any statement in the application for any policy covered by this act may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer.***"

It is thus apparent that plaintiff's application contained a misrepresentation in that she failed to disclose her hospital treatment during April of 1966. See *Unger v. Metropolitan Life Ins. Co.*, 103 Ill.App.2d 150, 155. Under plaintiff's testimony, which remained unchallenged at the trial, she had no actual intent to deceive defendant. Consequently, the remaining issue which must govern the rights of these parties is whether plaintiff's conduct in failing to disclose the additional medical treatment materially affected the acceptance of the risk or hazard assumed by defendant.

Decisions interpreting the statute have established that determination of whether innocent misrepresentations materially affect the acceptance of the risk or the hazard assumed by the insurer is a question of fact. *Mooney v. Underwriters at Lloyd's*, 33 Ill.2d 566, 569; *Ehret v. Loyal Protective Life Ins. Co.*, 112 Ill.App.2d 289, 294. In addition, *Smith v. Monumental Life Ins. Co.*, 301 Ill.App. 217, not cited by either counsel, deals with virtually similar facts and is dispositive of the issue here.

In the case at bar, the burden of proof rested upon defendant in connection with this affirmative defense. Defendant

tendered an officer of its company as a witness but the court ruled that he would be permitted to testify only that the claim had been denied. Under these circumstances, we are impelled to conclude that defendant did not have a fair opportunity to make proof of its affirmative defense.

The judgment in favor of plaintiff is, therefore, reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed, cause
remanded with directions.

BURKE, J. and LYONS, J. concur.

55199

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY
)	
CONNIE LEWIS,	)	HON. ROBERT J. DOWNING
	)	JUDGE PRESIDING
Defendant-Appellant.)	

AB
ST.

MR. JUSTICE BURMAN delivered the opinion of the court.

The defendant pleaded guilty to an indictment charging him with the offense of armed robbery of a service station attendant at 3:00 A. M. on the morning of December 8, 1962. He was sentenced to serve a term of not less than three nor more than four years in the penitentiary.

In his brief, defendant contended that the sentence of three to four years contained an excessive minimum sentence which denied him an opportunity for parole, and urged that we reduce the sentence to a term of two to four years. During oral arguments we were informed that the defendant had been granted parole on September 21, making this request moot, but the defense insists that the court's admonition to the defendant on his plea of guilty was inadequate because the court failed to inform the defendant that on the minimum sentence given to him he would be ineligible for parole. Defendant urges that anything which affects the length of detention would have primary significance in an accused's determination whether to plead guilty and that therefore we should reverse and remand the cause for a new trial. We disagree.

The record discloses that before accepting the defendant's plea of guilty the court admonished him that he might be sent to the penitentiary for any number of years with a minimum of two years and with no limit on the maximum. The trial judge's

admonition adequately conformed to the requirement under Illinois law that a trial judge inform a defendant of the maximum penalty provided by law before accepting a plea of guilty (Ill.Rev. Stat.1969, ch.38,par.115-2), and to the more recent standard (inapplicable in the case at bar because it did not become effective until September 1, 1970) that the court must inform the defendant as to both the maximum and minimum sentences possible under the law (Ill.Rev.Stat.1969, ch.110A,par.402). The defendant has cited no Illinois cases, nor has our research disclosed any, which have held that a trial court must also admonish a defendant as to the possibility of parole before accepting a guilty plea. In fact, numerous Illinois cases demonstrate that the trial court's admonition in the instant case was entirely adequate. See, e.g., People v. Hildreth, 115 Ill.App.2d 410,252 N.E.2d 729; People v. Howard, 114 Ill.App.2d 466,252 N.E.2d 681.

Based on the extensive criminal background of the defendant, one can only comment that the minimum sentence was clearly not excessive, but that the maximum sentence given to defendant may have been too lenient. We reject the argument that the court erred in not informing the defendant of his possibilities of parole before accepting his plea of guilty. The sentence imposed for the offense of armed robbery was well within the statutory limits (Ill.Rev.Stat.1969,ch. 38,par.18-2 (b)), and will be affirmed.

AFFIRMED.

DIERINGER, P.J. and ADESKO, J.
CONCUR.
(ABSTRACT ONLY)



3 I.A.³ 683

MAR 20 1972

55248

IRWIN R. CALLEN and YAKO Y. LEBAR,)
)
Plaintiffs and Counter-)
defendants-Appellees,)
)
)
v.)
)
)
)
ALBERT KORETZKY, ELAINE KORETZKY)
and JEAN E. MUNIC,)
)
Defendants and Counter-)
plaintiffs-Appellants.)

ABST.

Appeal from the Circuit

Court of Cook County.

Wayne W. Olson, A.J., and
Lester Jankowski, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

In December 1964, Isadore Koretzky, a patient in Edgewater Hospital, Chicago, was being treated for an ankle condition by two doctors named Strub and Jacobsen. On December 15th he suffered a heart attack and the treating physicians called two heart specialists, Dr. Irwin Callen and Dr. Yako Lebar, into the case. On December 17th the children of Isadore Koretzky discharged Strub and Jacobsen. On the same day they sent a telegram to Callen and Lebar, notified them of the discharge and asked them to "please continue to handle Mr. Koretzky's case in your excellent manner."

Callen and Lebar were not compensated for their services and, in 1969, they filed a complaint against the defendants, Koretzky's son and daughters, for \$425. The defendants demanded a bill of particulars. The bill of particulars detailed the

professional services performed by the plaintiffs on December 15 and 16, 1964, and reasserted that the services were requested by the defendants. Attached to the bill was a copy of the December 17th telegram.

The defendants filed an answer and a counterclaim. The answer denied that the plaintiffs entered their father's case at their request or that they were responsible for the services performed. The defendants pointed out that while the complaint was for services rendered on December 15th and 16th, the bill of particulars admitted that their request to Callen and Lebar was not made until December 17th.

The counterclaim alleged that when the defendants attempted to retain the plaintiffs, the latter refused to attend their seriously ill father and threatened to let him die unless Strub and Jacobsen were rehired. The counterclaim charged that the threat was made maliciously for the purpose of intimidating the defendants and the threat inflicted severe mental suffering upon them since their father was extremely ill and required constant care and attention. The defendants demanded \$250,000 for actual and punitive damages.

The plaintiffs moved to strike and dismiss the counterclaim. The motion to strike was allowed and the defendants were given leave to file an amended counterclaim. In 1970, when the case came on to be heard, the plaintiffs moved for a non-suit.

The motion was granted and the case was dismissed. The defendants moved to vacate the order, for judgment on the pleadings and for the award of an attorney's fee. The motions were denied. The defendants appeal from the orders striking their counterclaim, granting the voluntary non-suit, refusing to vacate the dismissal of the suit and denying their motion for judgment on the pleadings.

Before we reach the issues raised in this appeal, we are confronted with a jurisdictional problem: it appears that no appealable order was entered in the trial court. According to the record the defendants were granted 28 days to file an amended counterclaim. No amendment was filed and no order was ever entered dismissing their counterclaim. The order striking the counterclaim did not dispose of the rights of the parties and was not a final order. Griffin v. Board of Education of City of Chicago, 38 Ill.App.2d 79, 186 N.E.2d 367 (1962); Johnson v. City of Rockford, 26 Ill.App.2d 133, 169 N.E.2d 534 (1960).

The dismissal of the plaintiffs' complaint following the non-suit cannot be construed as a dismissal of the counterclaim. The order stated:

"Now come the plaintiffs herein and move the court that plaintiffs be non-suited, wherefore it is ordered that this suit be and it hereby is dismissed out of this Court.

"It is therefore considered by the Court that the defendants have judgment herein as in case of non-suit and that the defendants have and recover of and from the plaintiffs, the cost by the defendants herein expended and that execution issue therefor."

Although the order provided that "this suit be and it is hereby dismissed" the language was broader than was required for the non-suit. If the language of a judgment is broader than necessary it will be limited so that its effect is only as is needed for the issue decided. Midland Coal Corp. v. County of Knox, 1 Ill.2d 200, 115 N.E.2d 275 (1953).

Where a counter-action sets up new facts and prays for affirmative relief and shows grounds by which the jurisdiction of the court may be upheld independently of the original complaint, as does the present one, the dismissal of the complaint does not carry the counterclaim with it. The defendants' counterclaim remains for disposition in the trial court.

To be appealable, an order must be final and where finality of judgment is lacking, it is the duty of the reviewing court to dismiss the appeal for want of jurisdiction even if the parties are willing, as they appear to be in this case, to forego questioning the court's jurisdiction.

Likewise, we are without jurisdiction to consider the orders granting the non-suit and denying judgment on the pleadings. The orders did not dispose of all the pending claims as the counterclaim was still unlitigated. If multiple claims for relief are

involved, an appeal may be taken from a final judgment as to fewer than all of them only if the trial court has made an express finding that there is no just reason for delaying appeal. Supreme Court Rule 304; Weidler v. Westinghouse Electric Corp., 37 Ill. App.2d 95, 185 N.E.2d 100 (1962). There was no such finding in this case; therefore, the orders are not appealable and this phase of the appeal must also be dismissed.

Appeal dismissed.

McGlooin, P.J., and McNamara, J., concur.



55677

ABST.

3 I.A.³ 694

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
MCHENRY HILL,	)	Hon. Richard J. Fitzgerald,
	)	Presiding.
Defendant-Appellant.)	

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, defendant, McHenry Hill, was found guilty of armed robbery [Ill.Rev.Stat. 1969, ch.38, pars.18-1(a) and 18-2(a)] and also of attempt murder [Ill.Rev.Stat. 1969, ch.38, par.8-4(a)]. He was sentenced to concurrent terms in the penitentiary from 25 to 60 years for the former offense and 10 to 20 years for the latter. Defendant appeals to this court, contending that he was denied due process of law because of an unnecessarily suggestive pretrial identification and that, because his identification was vague, doubtful and uncertain, he was not proved guilty beyond reasonable doubt. Defendant made a pretrial motion to suppress identification testimony. This was denied by the court. To prevent duplication we will state all pertinent facts developed by the testimony on the motion and at trial.

On October 30, 1969, the complaining witness was returning to her home at approximately 1:30 in the morning. At one point, she noted a small framed man approximately 100 or 150 feet behind her. When she arrived at the gate in front of her residence, she was approached by a man who seized her right arm and asked her if she had a gun. She observed this man to be approximately five feet five inches in height, weighing approximately 140

pounds, of dark complexion, dressed in dark pants and hat and a black and white coat. She identified this person as being the defendant.

The witness further testified that she handed her purse to defendant and turned to go up to her apartment. Defendant grabbed her with his left hand, kept his right hand in his pocket, nudged it against her back and told her not to scream or say anything or he would blow her brains out. At defendant's direction, she proceeded to walk north for some distance to a vacant lot. They crossed this lot and turned to go up an alley. Defendant then pushed the witness into a gangway leading from the front to the back of a building. He told her to turn and face the wall, handed her the purse and told her to give him the money out of it. She obeyed and gave him one dollar. Defendant also took an additional 25 cents from her. He then pushed her forward until they came to a street. At that time, the witness noticed a police officer approximately 30 feet away. The officer demanded that the defendant halt. She stepped behind a tree and then heard some shots. Defendant ran away and was pursued by an officer. The witness was with the defendant for a little longer than five or ten minutes.

The witness next saw the defendant about 2:00 a. m. in the emergency room of a hospital. He was nude but partly covered by a towel. The police told her that the person at the hospital could possibly fit the description she had given. After viewing defendant, she was unable to be positive about her identification because there was too much light and she was nervous and exhausted. At that time, she observed that defendant had a cast, she thought, upon his right arm. She was then shown some articles of clothing on a table "a couple of feet" from defendant's bed and they were similar to that worn by her assailant as she had described

them to the police. Defendant was the sole occupant of the room. She had taken particular note of the black and white or peppered coat worn by her assailant when he had motioned her with his gun.

The next witness was a citizen who lived in the same area as the complainant. He had been seated in his car in a parking lot at the time in question. Both the alley and the parking area were well lit. He noticed a couple approaching from about a block and a half away. He described the male as a Negro person some 34 or 35 years old, about five feet five inches in height with his right hand in his pocket, shortly behind the female. He noted the woman rocking a bit with the man drifting from either side but remaining behind her. As they came closer, the witness saw that the man was holding a gun in his right hand. He also noted that there was a purse hanging by the strap over the elbow of the man's left arm. He watched as these people walked some 50 to 100 feet past him until they turned west and went into an areaway and down some steps. He then left the parking lot in his car and summoned the police. This witness made an in-court identification of the defendant. He did not see a cast on the defendant's arm.

A police officer testified that he was stopped by the preceding witness. He went to the area in question and into the gangway. He could see a silhouette of a tall woman approximately five feet 11 inches and a shorter man some five feet four or five inches. At that time, they were approximately 15 to 20 feet away. He noted that defendant was wearing a salt and pepper tweed coat and dark trousers. He noted an object in defendant's hand and commanded him to halt. Instead the defendant "placed the woman toward the ground" and started away with his back to the officer. The officer shouted that he would shoot unless

the defendant halted. Defendant made a half-turn and fired a shot from the revolver which he held in his right hand. The witness returned the fire and chased defendant. His partner joined the chase. Defendant ran under a street light of a nearby street. The second police officer outdistanced the first. The witness saw the defendant sometime later lying on the parkway between the street and the curb and noted the same coat and upturned black rimmed hat. As he approached, he asked what had happened and the man responded, "I've been stabbed." The police officer turned him over, saw his face and exclaimed, "Aha, I got you." This took place some 40 minutes to an hour after the original encounter. The officer noted that defendant had a gunshot wound in the right area of the back approximately in the shoulder area. Defendant was then taken to the hospital.

The remaining police officer corroborated the testimony of the first. They were summoned by a citizen and proceeded to the area. He proceeded through the gangway following the other policeman, the man and the woman. He then observed the man and woman standing under street lights in very good lighting conditions. His description of defendant at that time coincided with the testimony of the other three witnesses. He saw the defendant fire a shot at the other police officer. He joined in the chase and fired several shots. He then passed his fellow officer and noted the defendant climbing a fence and then jumping off of it. He continued the chase and fired again. He noted that one shot hit the defendant. Defendant then darted away, running close to a wooden fence. He went back to the squad car and called for assistance. Some 35 or 40 minutes later, pursuant to a message which he received, he proceeded to an area some two blocks away from where he had shot at the defendant. He noticed drag marks as though a person had limped or dragged his leg from the place

where he had last seen defendant to a point immediately across the street from where defendant was found.

The defendant testified in his own behalf. He stated that his past record included penitentiary sentences for robbery in 1958 and also in 1961. In addition, he stated that he had been found guilty of rape and sentenced to a term of 25 years. He also testified that on the day in question he left his home at about 10:00 p. m. to go to the store and that he had to be back home in an hour. He had no weapon with him. He went to buy cigarettes and wanted to return by 11 o'clock because his parole officer would check at that time to make certain that he was home. He purchased the cigarettes and, as he was walking home, he heard several shots, was struck and fell to the ground unconscious. After some time, he tried to get up but could not. He crawled back to his home. He met a lady who accused him of being drunk when he said he had been shot. Then some unknown persons wrapped him in a blanket and carried him to a car. When he woke up, he was in the hospital. He denied his guilt and stated that on the night in question he was wearing a cast on his wrist extending from a point one-half inch from the tip of his middle finger up to the elbow. This cast had been trimmed or shortened at the finger area. The cast was on his left arm.

The parties stipulated that a resident doctor at Cook County Hospital would testify that on September 27, 1969 at approximately 4:00 p. m. he placed a cast on defendant's left arm for a broken wrist. Before the cast was placed on the arm, defendant was able to use his shoulder and to rotate his arm and his fingers. In addition, he would testify that on the following day the cast was trimmed to permit movement of his hand. The parties also stipulated that if an officer from Cook County Jail were called, he would testify that on November 13, 1969 he examined defendant at the Cook County Jail and there was a cast on his left arm.

Defendant's first contention regarding the identification is directed at the testimony of the complaining witness and of the citizen who had summoned the police. Defendant contends that the testimony of the complaining witness was based upon impermissible police suggestion. In this regard, defendant was free to establish that the hospital confrontation was so suggestive as to be conducive to mistaken identification. *People v. Nelson*, 40 Ill.2d 146, 150 citing *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967. The proof falls far short of reaching this objective. The record does not support this contention because it shows simply that the police told the complainant that they had a suspect in the hospital who answered the description given by her. Defendant also argues that the witness failed to identify him immediately upon their encounter at the hospital. It could be argued with equal force that refusal of the witness to make an immediate and positive identification showed that she was a careful person. The fact that she reserved her opinion until she had viewed the clothes so similar to those worn by her assailant tends to support her testimony as being predicated upon careful observation and deliberation.

Furthermore, the courts of this jurisdiction have repeatedly and consistently held in a great number of recent decisions that, even where a pretrial confrontation is suggestive and conducive to mistake, an in-court identification by a witness is proper when it rests upon sufficient uninfluenced prior opportunity for observation of the defendant by the complaining witness which constitutes an independent and untainted basis for identification. *People v. Fox*, 48 Ill.2d 239, 245; *People v. Dennis*, 47 Ill.2d 120, 128; *People v. Stringer*, 129 Ill.App.2d 251, 266. In the case at bar, the complaining witness had an excellent opportunity for observance of defendant, generally

under good lighting and other conditions. The same situation is true with reference to the testimony of the civilian witness who summoned the police. He had full opportunity to see defendant under virtually ideal conditions.

In addition, the hospital confrontation took place within an hour after commission of the crime. It was the duty of the police to summon the complaining witnesses at once to determine the guilt or innocence of the suspect. This procedure was as important and necessary to defendant as it was to the State. A mass of authority supports the principle that rights of the defendant are not violated by this type of on-the-spot identification procedure used shortly after commission of the crime. See *People v. Young*, 46 Ill.2d 82, 87 and authorities there cited. See also, *People v. Johnson*, ___Ill.App.3d___, 273 N.E.2d 503, decided by this court on June 21, 1971, petition for leave to appeal denied September 28, 1971. The order of the trial court denying defendant's motion to suppress the identifications was eminently correct.

Defendant's brief mentions the fact that the witness who had parked his car in the vicinity never viewed defendant in a line up. Under the circumstances in this case, this does not give rise to any inference unfavorable to the State. Identification by the three remaining witnesses is sufficient beyond all reasonable doubt. *People v. Lee*, ___Ill.App.3d___, 273 N.E.2d 728; leave to appeal denied November 29, 1971.

Defendant also assails his trial identification upon factual grounds. These arguments are based primarily upon the fact that one witness could not say if the assailant had a moustache and he was certain that he saw no cast on defendant's left hand. Here, the argument is interwoven with defendant's contention

that the proof is not adequate to establish guilt beyond a reasonable doubt. These contentions fall for a number of reasons. First, in *People v. Mitchell*, ___ Ill.App.3d ___, (General No. 55282), decided by this court on November 22, 1971, in considering an identical argument, this court held that:

where an identification is positive, precise accuracy in describing facial characteristics is unnecessary. *People v. Catlett*, 48 Ill.2d 56, 63; *People v. Ruderson*, 129 Ill.App.2d 271, 278. Similarly, our courts have held that '[s]light discrepancies do not destroy the credibility of eyewitnesses but only go to the weight to be given their testimony.' *People v. Willis*, 126 Ill.App.2d 348, 354. Specifically, the failure of a witness to notice the presence or absence of a moustache, or of other physical features or characteristics, has been held to be a minor discrepancy. *People v. Luckey*, 126 Ill.App.2d 15, 28; *People v. Howard*, 112 Ill.App.2d 167, 171, 173; *People v. Ford*, 89 Ill.App.2d 69, 78, 79 cert. denied 393 U.S. 942.

Secondly, these factual contentions of defendant are virtually made in a vacuum because they disregard the clear and positive identification of the defendant by the two police officers. They overlook important circumstances such as the fact that defendant had been wounded when apprehended and the uncontradicted testimony of a police officer that defendant first said he had been stabbed and that when the officer first looked at defendant's face, after turning him over, he himself made an involuntary exclamation evidencing his recognition of defendant. Another piece of most cogent and convincing evidence is the established physical fact of the drag marks leading from the point where defendant was shot to a point immediately across the street from where he was arrested. Under circumstances of this type, contentions regarding alleged discrepancies in identification by the two remaining witnesses must be rejected.

As a final word on this issue, this court has consistently and properly held that adequacy of identification of a defendant in a criminal case is always a question of credibility which is to be resolved by the trier of fact. *People v. Stringer*, 129 Ill. App.2d 251, 262; *People v. Holt*, 124 Ill.App.2d 198, 201; *People v. Witcher*, 121 Ill.App.2d 57, 60; *People v. Tucker*, 118 Ill.App. 2d 136, 139. This principle has been properly and appropriately described as being "***so fundamental as not to require citation ***." *People v. Evans*, ____ Ill.App.3d ____; 270 N.E.2d 444, 446.

The above considerations answer defendant's contentions regarding sufficiency of the proof. We find specifically that the identification of defendant by four eyewitnesses was positive and certain. Defendant's uncorroborated alibi is meaningless in the face of testimony of this type. See *People v. Catlett*, 48 Ill. 2d 56, 64 and *People v. Wright*, 126 Ill.App.2d 91, 97. The evidence of guilt here is overwhelming and beyond any reasonable doubt. The judgments and sentences appealed from are affirmed.

Judgments affirmed.

BURKE, J. and LYONS, J. concur.



3 I.A.³ 695

MAR 20 1972

ABST.

55912

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
MICHAEL GARCIA,	)	Hon. Mel R. Jiganti,
	)	Presiding.
Defendant-Appellant.)	

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Defendant, Michael Garcia, was jointly indicted with Clifford Ferguson for murder [Ill.Rev.Stat. 1967, ch.38, par. 9-1(a)(2)]. On motion of defendant, he was granted a severance. A jury found defendant guilty and he was sentenced to a term of 25 to 50 years in the penitentiary. Defendant first appealed to the Supreme Court of Illinois upon the theory that a constitutional issue was involved. The Supreme Court found no substantial constitutional issue which would confer jurisdiction and the appeal was transferred to this court.

Defendant contends: 1) that he was prejudiced by reference made by the prosecutor to his failure to make an exculpatory statement before trial; 2) also by reference made by the prosecutor to certain gruesome photographs; 3) that the evidence failed to prove him guilty beyond a reasonable doubt; and, finally, 4) that the sentence is excessive. This opinion will state the pertinent facts and will first consider the point raised as to sufficiency of the proof.

The badly battered body of the deceased was found floating in the North Branch of the Chicago River underneath a bridge in the area of Nelson Street and Western Avenue. Expert

testimony established that the cause of death was rupture of the heart resulting from external violence which could have been applied to the chest with a fist, knee or the side of the hand. There were numerous head and facial lacerations, probably caused by a piece of wood. The expert believed that the head wounds could not have been inflicted by a stone or rock. These head injuries were themselves sufficient to have caused death. A wooden club found on the river bank in the area was stained with blood of the same type as that of deceased. An expert further testified that the body had been placed in the water after death. There were large scratch marks on the back inflicted after death which could have resulted from dragging the body over rough terrain such as the river bank.

Linda Edwards, a friend of defendant, testified that during the evening hours of June 14, 1968 she was visited at her home by defendant, Ferguson and deceased. All of them were young people. Defendant was then 17 years of age and Ferguson was 18. The deceased was actually 14 years old but had stated his age as 16. This witness testified that the three young men left her home together at about 9:30 p. m. They walked to Nelson Street then turned the corner; walking towards the bridge. Defendant told her that he and Ferguson had to go some place and would return in about 15 minutes.

Later that evening, the witness again saw defendant and Ferguson. They were walking together on Nelson Street, coming from the bridge. Defendant then had blood on his shirt, neck and hands. Ferguson's knuckles were bleeding. Defendant told her that there had been a fight with deceased. He said that the deceased was supposed to have hit his mother with a brick and stolen money from her and that she was in a coma in the hospital. At that time, Ferguson kept saying to defendant,



"Let's go. Let's go. You don't want us to get busted." She further testified that at approximately one o'clock in the afternoon on the following day (June 15, 1968) she had seen defendant again. He then told her that deceased had wanted her telephone number and that he had complied. He said that he and his in-laws had gone back to the body and went through the pockets of the deceased to find the paper with the telephone number on it because he did not want the witness to be involved. Defendant also told her to be quiet about the matter and not to tell anybody.

A young man who lived next door to the preceding witness testified that on the evening of June 14, 1968 he saw the deceased walking up and down in front of the young lady's home. The defendant and Ferguson then approached the deceased and all three walked off together toward Nelson Street. He followed them and, when they had turned the corner, he saw defendant talking to deceased and shaking him by the shirt with both hands. A neighbor then came to her window and Ferguson ordered the witness to leave. When he last saw the three young men they were walking down Nelson Street toward Western Avenue. Deceased was in the center and defendant and Ferguson were holding him by the arms. Later that evening the witness saw Ferguson and defendant on Nelson Street about one-half block from Western Avenue. He gave Ferguson his shirt to wipe the blood from his hands, shirt and pants. This young man testified that he and some friends discovered the body the next day, June 15, in the water under the bridge and called the Fire Department.

Two small pieces of paper were found in the right hand front watch pocket of the trousers worn by deceased. The telephone number of the witness, Linda Edwards, was written upon one.

Defendant testified in his own behalf. He had entered the Marine Corps in February of 1968 and had been granted a leave to return home to visit his parents. He met deceased for the first time on June 13, 1968 by an introduction from Ferguson. Ferguson and the deceased had been living together. Defendant testified that he, Ferguson and deceased had, in fact, visited Linda Edwards on the evening of June 14, 1968. The three young men left together and walked around the corner onto Nelson Street. At that time, deceased and Ferguson entered into an argument which lasted some five or ten minutes. Ferguson then struck deceased in the face.

Deceased was five feet four inches tall and weighed 109 pounds. Ferguson was about six feet tall and defendant about five feet seven inches. After the blow, deceased told defendant that the incident was none of his business. Defendant testified that deceased looked like he was getting ready to raise his hand but defendant grabbed him by the shirt and shook him. He then released the deceased and walked away. He walked a short distance and then turned around to see if the argument had stopped. No one was visible. He then proceeded to search for the other two but could not find them until he heard a moaning sound from underneath the bridge.

He went down the path to a point underneath the bridge and saw Ferguson and the deceased. Ferguson had a brick in his hand about eight by 18 inches. He asked Ferguson what he was doing and Ferguson dropped the brick which fell on decedent's head. Defendant then removed the brick from the deceased and propped up his head. Deceased was bleeding profusely but defendant heard him moan. He then stood up and saw that he had blood on his own hands. He wiped his hands on his shirt and proceeded to leave the area. Ferguson followed about twelve feet behind

him and they joined some other young people including Linda Edwards. She asked the defendant what happened because she noticed the blood on his shirt. He responded that there had been a fight with the deceased but that it was none of her concern and she didn't have to know what it was all about. Ferguson then told Miss Edwards to let defendant go home if she didn't want him to be arrested.

Defendant further testified that he called his sister shortly after midnight and asked if he could come to speak to her husband. She said that her husband would not be home until late in the morning. Defendant went to her home and waited there for his brother-in-law. He testified that after the latter arrived, he left his sister's home about 4:30 in the morning and went home. He also stated that Ferguson had told him that he had been unable to locate the paper with the telephone number that defendant had given to the deceased. Defendant left Chicago on the 18th of June because his leave was to expire at midnight June 20. He returned to Los Angeles by train. In due course he was extradited. He had received combat training in the Marine Corps, including instruction in karate. Defendant admitted that a blow by a person possessing this skill could cause internal rupture without exterior marks like the blow which caused the death of decedent. Defendant denied that he had ever told Miss Edwards that deceased had assaulted his mother or stolen money from her. No one had ever hit his mother with a rock, but there was a rock thrown into the window. He did not deny that he told her that he and "his in-laws" had gone back to the body of the deceased to look for the paper with the telephone number on it.

Defendant's mother testified in his behalf that her kitchen window had been broken by a brick thrown through it on June 14, 1968. She had told the defendant about this the next morning.

She never had any occasion to believe that this brick had been thrown by the deceased. No money had been stolen from her, nor did she tell anyone that this had occurred.

We will first consider the third point raised by defendant regarding the degree of proof. Defendant urges that the State failed to prove him guilty beyond reasonable doubt. The basic legal principles here involved are concerned with the nature and effect of circumstantial evidence. The case against defendant rests upon circumstantial as distinguished from direct evidence. Actually the law makes no distinction between direct and circumstantial evidence which have the same legal weight and effect. *People v. Robinson*, 14 Ill.2d 325, 331; *People v. Gavurnik*, 2 Ill.2d 190, 196; *People v. Johnson*, 88 Ill.App.2d 265, 282. It has been held repeatedly that circumstantial evidence which produces a reasonable and moral certainty that the accused committed the crime charged is sufficient to justify a conviction. *People v. Schulewitz*, 87 Ill.App.2d 331, 337 citing *People v. Garnier*, 20 Ill.App.2d 331. It is true that where the only evidence in a prosecution for homicide is circumstantial, the guilt of the accused must be so thoroughly established as to exclude every other reasonable hypothesis. *People v. Lewellen*, 43 Ill.2d 74, 78. However, this does not mean that the People are required to establish each and every element of guilt beyond the possibility of doubt. *People v. Murdock*, 48 Ill.2d 362, 367-368; *People v. Kinzell*, 106 Ill.App.2d 349, 355; *People v. Brown*, 83 Ill.App.2d 411, 416. The principle is well settled that the commission of an offense and the guilt of a defendant may be established entirely by circumstantial evidence and it is "***necessary only that the proof of circumstances must be of a conclusive nature and tendency leading, on the whole, to a satisfactory conclusion and producing a

reasonable and moral certainty that the accused and no one else committed the crime." People v. Marino, 44 Ill.2d 562, 580 citing People v. Bernette, 30 Ill.2d 359, 367 and other authorities. This court has consistently applied and used the same precept. See People v. Mack, 120 Ill.App.2d 149, 155. Application of these principles to the case at bar leads directly and convincingly to the conclusion that guilt has been proved beyond reasonable doubt.

The uncontradicted evidence shows that defendant and Ferguson were in the company of deceased on the evening of the fatality and that all three walked together toward the bridge. There is testimony that later in the evening defendant and Ferguson were seen returning together from the scene of the crime. Defendant's shirt, neck and hands were stained with blood. Defendant's statement that his hands were stained from propping up the head of the deceased and that he wiped some of the blood on his shirt is contradicted by the fact that even his neck bore blood stains.

Defendant and Linda Edwards agreed that he told her that there had been a fight with the deceased. She testified that defendant said that deceased had assaulted and robbed his mother. The mother denied that assault or robbery had occurred. Defendant testified that he told Miss Edwards only that the fight was none of her business. However, in the presence of Miss Edwards, Ferguson repeatedly urged defendant to leave for fear that both of them would be arrested. Admittedly defendant did not then immediately assert innocence and did not deny his guilt to Miss Edwards. Linda Edwards even testified that defendant told her to be quiet about this matter. The evidence shows that defendant and Ferguson left together with the deceased, they remained away together and they even returned together after fatal injuries had been inflicted. Defendant knew that deceased needed medical



attention but he summoned no aid, stating in his testimony that Ferguson should have done so. .

Linda Edwards testified that defendant and his brother-in-law made a nocturnal visit to the scene of the crime where they searched the deceased in an attempt to find a paper with Linda Edwards' telephone number. Defendant was less than frank with the court and jury when he admitted that he went to his sister's home after midnight to see her husband and left there at 4:30 in the morning but he did not admit that he did so to revisit the scene of the crime and he attempted to create the impression that Ferguson had gone to search the body. Defendant did not deny the testimony of Miss Edwards that he admitted that he returned to the bridge with his brother-in-law. The facts that deceased was dragged on the river bank after death and that the body was found in the water show an attempt at concealment by defendant motivated by a consciousness of guilt.

The second credible witness testified that he saw defendant and Ferguson together. He saw defendant holding deceased by the shirt and shaking him with both hands. Defendant, much taller and heavier than deceased, testified that he did this because of fear of imminent assault. Defendant and Ferguson then held deceased by the arms and walked with him between them toward the bridge. Defendant's testimony failed to explain convincingly why he left Ferguson and deceased at that time and later rejoined them at the bridge.

Defendant's testimony that he saw Ferguson holding the brick which was dropped on the head of deceased is contradicted by expert opinion that the head wounds were not caused by a stone or rock but most probably by the wooden club found on the river bank, stained with blood of the same type as that of deceased. A final link in the circumstantial chain is the established fact



that defendant was physically able to strike the type of blow that brought deceased to his death and he was qualified by knowledge and training to do so.

The only direct evidence placing defendant at the scene of the actual murder is his own testimony. However, as above shown, there is a mass of convincing circumstantial evidence which results in proof of guilt to a moral certainty. In situations where the facts and circumstances proved at trial carry conviction beyond a reasonable doubt, we may not disregard the verdict of the jury merely because there is some conflict in the evidence. *People v. Bartell*, 386 Ill. 483, 489; *People v. Martishuis*, 361 Ill. 178, 185.

That is why defendant's argument, that he was merely present at the scene without criminal intent and without actual participation in the offense and therefore he is not guilty, is of no avail. He elected to testify to his presence at the scene of the crime while the victim was apparently in a dying condition. Unless his denial of participation was reasonable, it could be rejected by the jury because of its improbabilities. See *People v. Moore*, ___ Ill.App.3d ___, 264 N.E.2d 582, 584 citing *People v. Smith*, 107 Ill.App.2d 267, 270; *People v. Bullock*, 123 Ill.App.2d 30, 34. Cases cited by defendant such as *People v. Reese*, 34 Ill.2d 77 are far from the point. In that case, the direct evidence showed that defendant was present at the scene of a robbery but there were many circumstances which tended to raise a grave doubt of guilt. This type of situation is completely different from the case at bar where there is cogent and convincing circumstantial evidence of guilt. Upon review of the entire record, we conclude that it presents at best an issue of credibility which the jury correctly resolved in favor of the prosecution. We find the verdict of guilty proper and supported by the evidence beyond reasonable doubt.



We turn now to the first point raised by defendant. He contends that error occurred when the prosecutor in cross-examination and in final argument used defendant's silence as an admission. On cross-examination of defendant, the prosecutor asked when was the first time that defendant had ever told anybody the story that he had related in court. No objection was made and defendant responded that the first time he ever told anybody was when he had a conference with the attorneys who represented him at trial. When the prosecutor continued along these lines and asked the defendant whether that occurred during last winter, counsel for defendant objected. The court sustained the objection. The prosecutor then asked if he had told the public defender in California that he wanted to come back to stand trial. No objection was made and the defendant responded that he did not. The prosecutor then asked if defendant ever told anybody prior to talking to his trial counsel what his story was. The record shows that the defendant responded negatively but that his counsel objected and the court sustained the objection.

We find no error in this cross-examination. Since defendant made no objection to the testimony, he cannot raise any point thereon for the first time in this court. *People v. Eubank*, 46 Ill.2d 383, 388; *People v. Harris*, 33 Ill.2d 389; *People v. Ridener*, 129 Ill.App.2d 105, 107. In addition, the scope of cross-examination is well within the sound discretion of the trial court. *People v. Armstrong*, 80 Ill.App.2d 77, 86; *People v. Freeman*, 78 Ill.App.2d 242, 256. A reviewing court will interfere only where there is a "***clear abuse of such discretion resulting in manifest prejudice to the defendant***." *People v. Burris*, 49 Ill.2d 98, 104 and cases there cited. See also *People v. George*, 49 Ill.2d 372, 381.



The record here shows that, on direct examination of defendant, his counsel brought out the fact that he was represented by a public defender in California in connection with his extradition. Defendant then testified to a conversation with this man in which he stated that he was willing to return to Illinois to stand trial. This testimony was intended to convince the jury that defendant was innocent because he was anxious to return to stand trial. The prosecutor was, therefore, entitled to attempt to refute or weaken this impression by bringing out on cross-examination that defendant did not assert his innocence at that time. One of the classic functions of cross-examination is to weaken or explain previous testimony of the witness by an attack on credibility. We find no abuse of discretion by the court in permitting this brief cross-examination.

Defendant then expands this argument by pointing out that, during his lengthy discourse to the jury in final argument, the prosecutor said that defendant had maintained silence and never asserted his innocence. No objection was raised to this brief statement and the point is therefore deemed waived. *People v. Hudson*, 46 Ill.2d 177, 197; *People v. Keane*, 127 Ill.App.2d 383, 393. In addition, on the entire record, we find no prejudice resulting to defendant from this comment. *People v. Trice*, 127 Ill.App.2d 310, 319; *People v. Acker*, 127 Ill.App.2d 283, 296.

The next contention of defendant is also directed to a statement made by the prosecutor in final argument. People's exhibits 1 and 2 were photographs of deceased taken after the body was recovered from the river. The record shows that although these exhibits were received in evidence, the court directed that they should not be shown to the jury. The prosecutor in his argument told the jury:



"You will not see the pictures for very obvious reasons. They would be inflammatory and very prejudicial as to what the face looked like***."

No objection was made to this argument. Also, there was detailed testimony by a pathologist regarding the condition of decedent's body. Several persons testified that they could not recognize the deceased from the pictures in question. The jury was therefore fully aware that the pictures presented a gruesome spectacle. Under these circumstances, we find that no prejudice resulted to the defendant from the comment. The principles and authorities above set forth concerning cross-examination of defendant and the comment thereon govern this contention also and require its rejection. We find that defendant had a fair trial and that the verdict of guilty should be affirmed.

As his final point, defendant attacks his sentence of 25 to 50 years as excessive. The rules of the Supreme Court permit us "to reduce the punishment imposed by the trial court." 43 Ill. 2d Rule 615(b)(4). However, we may exercise this grant of power only with considerable caution in a proper case to avoid a great departure from the spirit and purpose of fundamental law. *People v. Caldwell*, 39 Ill.2d 346, 356; *People v. Taylor*, 33 Ill.2d 417, 424 and *People v. Smith*, 14 Ill.2d 95, 97.

It is true that defendant was 17 years old when the crime was committed. He was without prior criminal record and was serving in the United States Marine Corps. However, we cannot view the sentence as excessive. In *People v. Moore*, ___ Ill.2d ___, Docket No. 42194, the Supreme Court of Illinois affirmed sentence of a 17 year old defendant to the penitentiary for 20 to 60 years for murder. The defendant there had a prior conviction for battery. The Supreme Court observed that the defendant showed, "little compassion and no remorse." In that case,

the deceased came to his death as a result of a stab wound. In the case at bar, defendant perpetrated a more vicious and revolting crime. See also People v. Sims, 1 Ill.App.3d 490. In view of all of the circumstances shown here, the sentence should not be reduced.

The judgment of conviction appealed from is, therefore, affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

February 8, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



FILED

No. 70-281

FEB 9 1972

HOWARD W. KELLEY, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the Fifteenth
	)	Judicial Circuit, Lee
ESTEL LEE THOMAS,	)	County, Illinois.
)	
Defendant-Appellant.)	

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Estel Lee Thomas, was convicted by a jury upon an Information charging him with burglary, and sentenced by the court to 3-5 years in the penitentiary. He claims that he was not proven guilty beyond a reasonable doubt and that his conviction should therefore be reversed. He also argues that the trial judge's extensive cross-examination of him and the failure to record the final argument entitles him to a new trial. Alternatively he asks that his sentence be reduced.

The defendant was charged with the burglary of Leffelman's Meat Center in Sublette, Illinois, alleged to have occurred on August 2, 1969, at approximately 4:00 A.M. There was testimony that Howard Leffelman, the owner, arrived at the store in response to a burglar alarm connected to his home and that for some forty minutes he watched three men ransack the building. After three trips in and out of the building, the owner's son told the men to stop but they ran toward a fence and an adjoining oat field.

Two men made it. Leffelman fired his rifle twice, the second shot fired in the direction of a man running in the oat field. One of the man, Craig Christman, was found wounded near the building. When deputies arrived, after a call, they found Thomas in the oat field.

When the defendant was found he was lying on his back with his eyes closed and a sock in his hand. The deputies testified that there were fragments of ham and cheese on the sock and an unknown greasy substance and small particles of ham on Thomas' face. The witnesses for the State did not observe that defendant was intoxicated.

There was testimony that the office and plant had been disturbed, a window broken, papers scattered, a pop machine pried open, canned hams opened, and chunks of cheese ripped apart. The only items missing were some packs of cigarettes and a checkwriter which were found near Christman.

The defendant testified in his defense. Essentially he said that on August 2, 1969, he was in a tavern in Mendota from noon to six or seven P.M., consuming 16 beers and 7 or 8 shots of whiskey; that he then went to his mother's tavern in West Brooklyn and stayed there until 10:00 or 10:30 P.M., consuming perhaps 6 beers and 6 or 7 shots of whiskey; then went back to the tavern in Mendota where he stayed until approximately 1:30 A.M., consuming 6 or 7 more beers and 3 or 4 more shots of whiskey. He then testified that a group of them decided to go to Wisconsin for the weekend and there was more drinking on the way. Thomas said he passed out and did not know where he was, but Christman awakened him and said he wanted some extra money. When Thomas told him he could borrow from him, Christman said he wasn't interested and Thomas went back in the car with the three girls who were along. At the time Christman and one Austin were out of the car and Thomas said he told the girls he was going to try to talk Christman

and Austin "out of it." He said he got out of the car and stumbled down a gravel road and they had to hold him up as he was so drunk. He kept telling them there was no sense in it, and the conversation continued until they reached the meat market. Thomas said they argued about whether they should pull a burglary and that he got sick and sat at the side of the building near a loading platform. The next thing he remembered was that Christman and Austin told him to get going and the three of them started to walk away when somebody shouted and a shot was fired. He started running and stepped through a fence but was too drunk and kept falling and finally gave up and just laid in the field. This was the last thing he remembered until the officers awakened him.

Other witnesses for the defendant testified to his intoxication.

The defendant argues that since Leffelman and his son could not say that he was the same person they had observed in the Meat Center Building, because they were too far away to see the features of the men in the building clearly, the State has failed to prove an entry beyond a reasonable doubt. We do not agree. There was substantial circumstantial evidence to prove the entry beyond a reasonable doubt. See The People v. Russell, 17 Ill.2d 328, 331 (1959).

Defendant also argues that the State failed to prove the intent to commit the felony. The basis of this contention is that Estel Thomas' drunken condition rendered him incapable of forming the requisite intent. Voluntary intoxication is no excuse for a crime. Nevertheless, when intent is a necessary element, it is competent to prove that the accused was, at the time, wholly incapable of forming the requisite intent. Ill.Rev.Stat. 1967, ch.38, par.6-3(a). See also The People v. Soznowski, 22 Ill.2d 540, 543 (1961). As in Soznowski, the evidence here as to the nature and



extent of defendant's drunkenness was conflicting and inconclusive and we cannot conclude as a matter of law that defendant was incapable of having the requisite intent.

There was, however, very substantial evidence of excessive drinking by the defendant which, if believed by the jury, would have been competent to prove that the accused was wholly incapable of forming the requisite intent. While the jury was not required to make this determination in defendant's favor on the conflicting evidence, it was particularly essential that the trier of fact not be unfairly influenced on this issue. From our examination of this record, we have concluded that the trial judge abused his discretion in prejudicially cross-examining the defendant at great length and that the defendant is therefore entitled to a new trial.

The prosecutor cross-examined the defendant as to his memory of events, whether he knew where he was, and as to his intoxication. The court then interjected the preliminary remark that there were certain matters which were not clarified and that he was going to therefore direct a few questions to the defendant. The court first asked the defendant a series of questions directed at the defendant's testimony that he had pleaded guilty to burglary in 1966. The prosecutor had not pursued the inquiry but the court established the sentence and the time served.

The court then inquired into the defendant's marital status and that of Mr. Christman and asked,

"Q. But neither your wife or Mr. Christman's wife were with you this evening?

A. No, sir.

Q. They weren't included in the plans to go to Wisconsin?

A. No, sir.

Q. Well, who were these other girls?"

Thereupon there was the following examination by the court:

"Q. Are you telling this Court and this jury that you had over forty-seven drinks during the course of that day and evening?

A. Forty-seven?



- Q. That's right, because I added them up just each time you were examined by your counsel and also by the Assistant State's Attorney and it comes to forty-seven drinks at the minimum and that's not including all of whatever you had out of the six pack.
- A. I don't believe it comes to forty-seven.
- Q. Well, according to your testimony it comes to forty-seven. Are you standing on your testimony?
- A. Yes, sir."

The court then proceeded to question the defendant at length as to the truth of his prior testimony about his inability to remember many facts, including the inquiry:

- "Q. No, but what I am saying is, you remembered all of the conversation that you had with Christman, as you related it here, is that right?
- A. Yes.
- Q. How you tried to discourage him from burglarizing things and how he didn't need the money and how you had enough money so nobody needed any more money to go to Wisconsin?
- A. That's right.
- Q. This you remember very well?
- A. Yes, sir.
- Q. But right now when you walk from there to Sublette you don't remember this, is that correct?
- A. Yes, I remember walking there, yes.
- Q. Well then you do remember walking from where this was to Sublette, or to Leffelman's I guess?
- A. Yes, sir.
- MR. STURGEON: Your Honor, I hate to complain.
- THE COURT: I don't understand where they are talking about, the location of things. The Court in it's discretion, has a right to ask questions if it doesn't appear that it is clear to the jury or to the Court, that's the law.
- MR. STURGEON: I want the record to show I am objecting to cross-examination by the Court."

We think that the questioning by the court went far beyond a mere clarification of certain testimony. The court asked some forty questions in the nature of cross-examination. It is well known that jurors are watchful of the attitude of a trial judge and his express indication of disbelief or lack of credibility must influence their verdict. Under these circumstances we must conclude that the defendant was denied a fair trial. See The



People v. Santucci, 24 Ill.2d 93, 97-99 (1962); The People v. Marino, 414 Ill. 445, 450 (1953); People v. Martin, 66 Ill.App. 2d 290, 294 (1966). See also United States v. Tobin, 426 F.2d 1279 (7th Cir. 1970).

In the view we have taken, we do not reach the remaining claims of error raised by the defendant.

The judgment below is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED

GUILD and MORAN, J.J. concur.



UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On February 8, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



FILED

No. 71-150

FEB 3 1972

HOWARD K. KELLEY, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

FOX RIVER CHRYSLER PLYMOUTH,)
INC., a Corporation, and)
WILLIAM L. GARLAND,)
)
Plaintiffs-Appellees,)
)
vs.)
)
DANNY BOLF,)
)
Defendant-Appellant.)

Appeal from the Circuit
Court for the Sixteenth
Judicial Circuit, Kane
County, Illinois.

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant appeals from a judgment for property damage and personal injuries entered in favor of plaintiffs after a non-jury trial, contending that plaintiffs were contributorily negligent as a matter of fact and of law, and that the judgment should therefore be reversed.

The case arises from a motor vehicle collision occurring on April 8, 1969, at the intersection of Palace Street and North Park Avenue in Aurora. It comes to us on a stipulation of facts in the absence of a verbatim transcript, from which it appears that Palace Street is a two lane road running north and south, and North Park Avenue is also two lanes and runs east and west. No traffic control of any kind is present at this intersection. At the time of the collision, defendant Bolf was proceeding east on North Park Avenue, and plaintiff Garland was proceeding south on Palace Street. The collision occurred approximately in the southwest portion of the intersection. Garland was currently

engaged in delivering some mail or other papers for his employer, Fox River Chrysler Plymouth, Inc., and was driving a company car.

The only witness testifying in the case was plaintiff Garland. He stated that as he approached the intersection, he slowed down and looked both ways. He saw defendant's car approximately 175 to 200 feet west of the intersection, and said that it was going at a normal rate of speed. He said that after his own car was in the intersection, defendant's car suddenly picked up speed and struck his car.

Defendant raises no issue concerning his own negligence, nor the amounts of the judgments awarded. His sole contention is that plaintiff Garland was guilty of contributory negligence, and that this negligence is attributable to his employer since he was acting within the scope of his employment.

Defendant argues that since his car was on the right, he had the right-of-way, and thus plaintiffs were contributorily negligent as a matter of law. It is true that generally, when two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the car on the left must yield the right-of-way to the vehicle on the right. Lamberes v. Northern Cartage Co., 86 Ill.App.2d 311, 313, 314, 229 N.E.2d 901 (1967); Hession v. Liberty Asphalt Products, Inc., 93 Ill. App.2d 65, 74, 235 N.E.2d 17 (2d Dist., 1968); Zapf v. Kuten, 229 Ill.App. 406, 407 (1923); Ill.Rev.Stat. 1969, ch.95½, sec. 11-901. However, this is not an absolute rule, and the elements of speed and the relative positions of the parties with respect to the intersection must be considered. Bessette v. Loevy, 11 Ill. App.2d 482, 486, 487, 138 N.E.2d 56 (1956); Payne v. Kingsley, 59 Ill. App.2d 245, 250, 207 N.E.2d 177 (2d Dist., 1965); Wilson v. Hobrock, 344 Ill.App. 147, 151, 100 N.E.2d 412 (1951); Gauger v. Mills, 340 Ill.App. 1, 6, 90N.E.2d 790 (1950).

The facts show that defendant was approximately 175 to 200 feet away when plaintiff Garland approached the intersection, and suddenly picked up speed after plaintiff's car was in the intersection. Garland might reasonably have presumed that defendant's car would remain at the same rate of speed, and that he would be able to cross the intersection before defendant's car reached it. In these circumstances, plaintiff's failure to yield the right-of-way to defendant did not constitute contributory negligence, either as a matter of law or fact.

We, therefore, affirm the judgment of the trial court.

AFFIRMED.

GUILD and MORAN, J.J. concur.

71-181
UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

3 I.A.³ 76
ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
February 8, 1972 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED

No. 71-181

FEB 7 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	Appeal from the Circuit
	)	Court of the Nineteenth
	)	Judicial Circuit, Lake
EUGENE BROWN, (Impleaded)	)	County, Illinois
)	
Defendant-Appellant.)	

PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Eugene Brown, the defendant, was convicted upon his negotiated plea of guilty to an indictment charging him with theft of over \$150. The plea followed a mistrial in a jury case after the State had put on four witnesses. As a result of the negotiations and plea, the remaining count of the indictment charging burglary was dismissed. Defendant was sentenced to 5 years probation, with incarceration in Vandalia for the first year. He has appealed, being represented by an attorney from the Illinois Defender Project, who now seeks to withdraw.

We allow counsel's motion to withdraw. From our examination of the record, we agree that the appeal is wholly frivolous and without merit.

The court's admonitions to the defendant were in substantial compliance with Supreme Court Rule 402. The court determined that the plea was voluntary, determined the factual basis for the charge and followed the sentence agreed upon in the plea bargain.

The court's failure to state the minimum and maximum sentence in open court is not reversible error since it is apparent that defendant was aware of the possible penalties which were stated in defendant's presence in chambers. Moreover, one of the co-defendants had negotiated the minimum sentence in defendant's presence, and defendant in open court stated that he understood what the penalty was.

The judgment below is affirmed.

AFFIRMED.

GUILD and MORAN, J.J. Concur.

3

I.A. 828

No. 70-54

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FEB 4 1972
CLERK

HUBERT MONROE,)	
	)	Appeal from the Third Judicial
Plaintiff-Appellee,	)	Circuit, Madison County.
)	
-vs-)	
)	
CHRYSLER CORPORATION,	)	Honorable A. A. Matoesian,
	)	Judge Presiding.
Defendant-Appellant.))	

ABST.

PER CURIAM:

Defendant appeals from the verdict and judgment for the plaintiff in the amount of \$118.70 actual damages and \$1500 punitive damages. He contends that the allowance of punitive damages was improper. Appellee has not seen fit to file a brief in this court.

The judgment in favor of the plaintiff and against the defendant for the sum of \$1500 punitive damages is reversed. The judgment in favor of the plaintiff and against the defendant for the sum of \$118.70 actual damages is affirmed.

Affirmed in part and reversed in part.

PUBLISH ABSTRACT ONLY.

Car, 4/23/72

55647

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

vs.

HONORABLE
WILLIAM J. McGAH
Presiding

Defendant-Appellant.

ABST.

Defendant was charged with driving on the wrong side of the roadway, improper lane usage (weaving) and driving while under the influence of intoxicating liquor. He was tried by the court, acquitted of the first two charges, but found guilty of the third. A \$100 fine was imposed. Defendant contends that the evidence was insufficient to prove his guilt beyond a reasonable doubt.

The arresting officer testified and his alcoholic influence report was admitted into evidence by stipulation. On June 8, 1970, at 2:07 A.M., defendant was observed operating his motor vehicle north on Harlem Avenue in the City of Chicago after having left a gasoline station at 9100 South Harlem. The officer noticed that defendant's vehicle was in the wrong lane and weaving. The defendant was curbed at 8700 South Harlem, and when he emerged from his vehicle, he "walked with a wobbling gait." His breath smelled of alcohol, his clothes were disarranged, he staggered and belched and, when requested to do so, was unable to touch his nose with either hand. The officer also observed that defendant's speech was "slurred," he was "thick-tongued," his eyes were bloodshot, his face flushed, and he was unable to readily pick up coins from the ground. Defendant told the officer

that he had been drinking beer at a tavern but did not know when he had departed. He had three or four beers and had stopped drinking at 2:02 A.M. He also told the police that he was not under medication nor under a physician's care. He had not eaten for about nine hours, and he refused to take a breath test because he said, "It won't help me." In the officer's opinion, defendant was unfit to drive because he was under the influence of alcohol.

Defendant testified that he was not intoxicated at the time and was not weaving between lanes or driving on the wrong side of the road. He had been willing to take all tests and cooperate fully with the police. He stated that he has an arthritic condition of his spine and leg, takes pills for this condition, and that it occasionally causes unsteadiness, limping and wobbling while walking.

Defendant contends that the trial court, sitting as the trier of fact, considered the police officer's account of his visual observations but nevertheless acquitted him on two of the three charges. He argues that because the court did not accept those observations as sufficient to convict on two of the charges, they could not be the basis of a conviction on the third. The court merely presumed guilt without an evidentiary basis and therefore the defendant was convicted without being found guilty beyond a reasonable doubt.

We cannot agree. The appellant's argument is based upon the assumption that a verdict of not guilty of an offense is equivalent to a finding of innocence. He implies that the acquittals on the first two charges completely discredit the officer's testimony and leave no evidence upon which to base a conviction on the third. In actuality, the

acquittals do not necessarily affect the veracity of the testimony. It is too basic for citation that an acquittal on a criminal charge is not a finding of innocence, but merely a determination that the State has failed to prove its case beyond a reasonable doubt. Thus, an acquittal need not be based upon a complete discounting of the testimony of a witness but may be merely a determination that the testimony, even though believed, was not sufficient to sustain a conviction on the charge.

In the case at bar, the defendant was charged with three separate offenses, each of which requires certain distinctive elements to be proved to support a conviction. Our perusal of the record indicates that the police officer was quite complete in describing the condition of the defendant at the time of the arrest, but that his description of the facts giving rise to the two charges of which the defendant was acquitted was not as extensive. It is therefore entirely possible that the trial court found the testimony insufficient to sustain the first two charges, but sufficient to sustain the third. And, in the absence of any indication to the contrary in the record, we must assume that this was the basis of the decision.

It is the duty of the trier of fact to determine the sufficiency of the evidence to sustain the charges, and, after having done so, to arrive at a judgment. This court will not substitute its judgment for that of the trier of fact. People v. Witt, 122 Ill. App. 2d 137. We therefore hold that the judgment of the trial court is not without an evidentiary basis and that the evidence was sufficient to support the conviction. The judgment is affirmed.

JUDGMENT AFFIRMED.

LEIGHTON and SCHWARTZ, JJ., concur.

(Abst. only)

3 I.A.³ 888

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

JOHN DELK (Impleaded),

Defendant-Appellant.)

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY) HON. MINOR K. WILSON,
) JUDGE PRESIDING.

MR. JUSTICE BURMAN delivered the opinion of the court.

ABST.

The defendant, John Delk, was indicted on the offenses of burglary and jumping bail. He plead guilty to both charges and was sentenced to a term of two to ten years on the burglary charge and one to five years on the jumping bail charge, the sentences to be served concurrently.

The sole question on appeal is whether his pleas of guilty were the result of a misapprehension on his part that upon conviction he would be released to the Indiana authorities for violation of parole and that the sentences in Illinois and in Indiana would run concurrently.

The motions to vacate his pleas and to set aside the judgments were denied after an extensive hearing. During oral argument we were advised that the defendant is presently in Indiana facing the charge of violation of his parole and it appears that he has been released from the Illinois penitentiary on parole in the instant judgments.

The record reveals that the defendant, who was represented by counsel of his choice, was fully informed as to his rights and the consequences of his pleas before they were accepted. There is not one scintilla of evidence in the record that any one promised the defendant that he would be released to Indiana or that the sentences in Illinois would run concurrently with his sentence, if any, in Indiana. Indeed defendant's attorney

received a letter from the Indiana authorities stating that they would make no predisposition of defendant's parole violation until the matters in Illinois were concluded. Moreover, prior to defendant's pleading guilty, his attorney informed him as to what his probable sentences would be and when he would be eligible for parole. Defendant's own testimony corroborated the fact that his attorney had advised him that "the least he could get me would be two to ten." Defendant's attorney stated that he had never indicated to the defendant that the Illinois sentences would be concurrent with any judgment in Indiana, but had always spoken in terms of his serving the Illinois sentences first and then taking care of his obligations in Indiana.

We cannot say upon the facts presented that the court abused its discretion in refusing to permit the withdrawal of the pleas of guilty by the defendant. People v. Grabowski, 12 Ill.2d 462, 147 N.E.2d 49. The record clearly reflects that the defendant was not under any misapprehension or mistaken belief as to the sentences he would receive upon his pleas. It is apparent that he plead guilty because he was guilty of the charges. There is nothing in the record to show that the trial court erred in denying the motions for leave to withdraw the pleas of not guilty or that "the ends of justice would better be served by submitting the case to a trial." People v. Worley, 35 Ill.2d 574, 577, 221 N.E.2d 267,270. The judgments of the Circuit Court are therefore affirmed.

AFFIRMED.

DIERINGER, P. J. and

ADESKO, J., concur.

(Abstract only)

71-86

UNITED STATES OF AMERICA

3

I.A.³ 932

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On February 1, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

IN THE

FILED

APPELLATE COURT OF ILLINOIS

FEB 1 1972

SECOND JUDICIAL DISTRICT

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Fifteenth
vs.	)	Judicial Circuit, Lee
	)	County, Illinois.
)	
FRANK LLOYD,)	
)	
Defendant-Appellant.)	

MR. JUSTICE ABRAHAMSON delivered the opinion of the court.

The defendant, Frank Lloyd, was convicted of the crime of gambling in violation of paragraphs (a) (3) and (5) of Section 28-1 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, sec. 28-1 (a) (3) and (5)) by the circuit court of Lee County after a trial by jury. Lloyd was admitted to probation for a period of four years with the first four months to be served in the state farm at Vandalia and fined \$1,000.00.

On appeal, the defendant contends that the trial court committed reversible error when it (1) denied his motion to quash a search warrant and suppress certain evidence obtained pursuant thereto; (2) denied his motion to conduct an evidentiary hearing

brought on the date of trial; and (4) denied his motion to produce certain reports, notes, memoranda and statements relative to the cause prior to the trial.

The complaint for search warrant, filed November 29, 1969, was brought by Bradner C. Riggs and requested the issuance of a warrant to search the person of Lloyd or the premises located at 1511 First Street, Dixon and seize "any book, instrument or apparatus by means of which bets or wagers have been, or are, recorded or registered and any money which he has received in the course of a bet or wager, including but not limited to football handicap cards, also known as football parlay cards..."

The complaint included an affidavit by Riggs that he had reasonable cause to believe that the items to be seized were located on the premises sought to be searched based on the following: (1) That he was an F.B.I. agent for 17 years; (2) that he was informed by one Philip Long that he was engaged in the sale of football parlay cards and that he had, on November 9, personally delivered certain cards and the wagers received thereon to Lloyd at the premises; (3) that Long furnished Riggs with 100 parlay cards on November 13 for football games to be played November 15; (4) that he was furnished an affidavit of a police officer named Anthony Viola where Viola stated that he was informed that similar parlay cards were in circulation in the area for the games of November 29; and (5) that Riggs personally knew Lloyd was a professional gambler.

on his motion to suppress; (3) denied his motion for continuance brought on the date of trial; and (4) denied his motion to produce certain reports, notes, memoranda and statements relative to the cause prior to the trial.

The complaint for search warrant, filed November 29, 1969, was brought by Bradner C. Riggs and requested the issuance of a warrant to search the person of Lloyd or the premises located at 1511 First Street, Dixon and seize "any book, instrument or apparatus by means of which bets or wagers have been, or are, recorded or registered and any money which he has received in the course of a bet or wager, including but not limited to football handicap cards, also known as football parlay cards..."

The complaint included an affidavit by Riggs that he had reasonable cause to believe that the items to be seized were located on the premises sought to be searched based on the following: (1) That he was an F.B.I. agent for 17 years; (2) that he was informed by one Philip Long that he was engaged in the sale of football parlay cards and that he had, on November 9, personally delivered certain cards and the wagers received thereon to Lloyd at the premises; (3) that Long furnished Riggs with 100 parlay cards on November 13 for football games to be played November 15; (4) that he was furnished an affidavit of a police officer named Anthony Viola where Viola stated that he was informed that similar parlay cards were in circulation in the area for the games of November 29; and (5) that Riggs personally knew Lloyd was a professional gambler.

Also attached to the complaint was an unsigned report dated November 25 of the F.B.I. relative to an "interview" with Long. The report stated that Long was contacted by his cousin to sell parlay cards at the Chrysler plant in Belvidere, his place of employment. The report also stated that Long obtained 150 cards for the games on November 8 which he distributed at the plant and collected the bets. In accordance with "instructions", Long delivered the cards and monies, less his commission, to Lloyd. Long later contacted Lloyd when he did not receive funds with which to pay the winners on the cards and met with him in Byron, Illinois.

Section 108-3 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, sec. 108-3) provides that "Upon the written complaint of any person under oath or affirmation which states facts sufficient to show probable cause and which particularly describes the place or person, or both, to be searched and the things to be seized, any judge may issue a search warrant....."

The complaint before us was written, signed by Riggs under oath, described the place and person to be searched, and, in our opinion, the things to be seized, with sufficient particularity. It is true that the facts used to show probable cause are based on information furnished to Riggs by another person, Long, and are, thus, technically, hearsay. However, it has been well established in Illinois, in accordance with decisions of the United States Supreme Court, that an affidavit or complaint for search warrant based on hearsay will not be held insufficient "so long as a substantial basis for crediting

the hearsay is presented." The People v. Parker, 42 Ill. 2d 42, 245 N.E. 2d 487, 489; The People v. Williams, 36 Ill. 2d 505, 508; The People v. York, 29 Ill. 2d 68, 70; Jones v. United States, 362 U.S. 257, 269; 4 L ed. 2d 697, 707; United States v. Ventresca, 380 U.S. 102, 13 L. ed. 684, 690.

However, the defendant maintains that the affidavit and complaint failed to establish a substantial basis to credit Long's statements in a number of respects. First, he contends that there is nothing to show Long was a "reliable" informant. The affidavit and report, however, both state that Long admitted that he was himself engaged in the sale of parlay cards for which he was ultimately arrested. In the recent case of United States v. Harris, 91 S. Ct. 2075, the Supreme Court held that an admission against penal interest could of itself establish sufficient credibility to support a probable cause to search. The court, at page 2082, said:

"People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility - sufficient at least to support finding of probable cause to search."

We agree with the logic of the Harris case and conclude that Long's admissions, together with his delivery to Riggs of the parlay cards, are sufficient evidence of the credibility of his information to support the issuance of the warrant.

The defendant next maintains that the complaint and affidavit failed to show that there was probable cause to believe that the items to be seized were located at 1511 First Street, Dixon, since



no where does it appear that either Riggs or his informants saw the items on those premises. In his affidavit, Riggs avers that Long informed him that he personally delivered parlay cards and monies received for wagers to Lloyd at the residence on First Street on November 8. We do not see that this unequivocal statement is contradicted by the report of the interview as urged by the defendant. The report states that Long was "instructed" to return the cards and monies to Lloyd at that residence and that he, thereafter, "turned in \$83.20 and the duplicate copies of the parlay cards to Lloyd." The reference to Byron, Illinois clearly relates to a second meeting with Lloyd and in no way contradicts Riggs' affidavit.

The defendant also argues that the lapse of time between November 8, when Long delivered the cards and money to Lloyd, and November 29, when the search warrant was issued, was too long to support the probability that the items were still located on the premises. As has been stated many times, there is no "hard-and-fast rule concerning the time within which a complaint for a search warrant must be made, except that it should not be too remote". The People v. Montgomery, 27 Ill. 2d 404, 405. Whether it is too remote depends on all the facts and circumstances before the magistrate and, in one case, a lapse of 49 days was not unreasonable where there was an indication that the offense was continuing. The People v. Dolgin, 415 Ill. 2d 434, 442.

Here, the facts before the magistrate showed that Long was told

that Lloyd was to be his "principal" in the distribution of the parlay cards and that Long personally delivered cards and monies to Lloyd at the premises to be searched. Long subsequently received 150 additional cards for the weekend games of November 15 which were turned over to Riggs. Anthony Viola, a police officer, furnished an affidavit where he stated that he was in possession of identical cards obtained from a heretofore reliable source for games on the weekend of November 29.

It is not necessary that the evidence show that the things to be seized are located in the place to be searched beyond a reasonable doubt before a warrant be issued but only that probable cause, a far less rigid standard, exists. The People v. Mitchell, 45 Ill. 2d 153, 148, /258 N.E. 2d 345, 348; The People v. Dolgin, 415 Ill. 434, 441. We agree with the position of the Supreme Court when they said, in the case of Spinelli v. United States, 393 U.S. 410, 21 L. ed. 2d 637, 645, that "...in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense;....and that their determination of probable cause should be paid great deference by reviewing courts...." (citations omitted)

We hold that complaint for search warrant and supporting documents in this case were sufficient to show probable cause for the issuance of the warrant and that the motions of the defendant to quash and suppress were properly denied.

Our Supreme Court has held that matters alleged under oath,



upon which a search warrant is issued, may not be contested by one subjected to the search. The People v. Bak, 45 Ill. 2d 140,^{144,} 258 N.E. 2d 341, 343; The People v. Mitchell, 45 Ill. 2d 148,^{152,} 258 N.E. 2d 345, 347. "It is contemplated that the credibility of the affiant or others offering evidence is for the judicial officer. If he finds the evidence worthy of belief and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the evidence." The People v. Bak, supra. The defendant is of the belief, however, that a hearing should be held, not to contest the matters alleged under oath, but to bring out matters "omitted" from the complaint and affidavit. We are unable to perceive the distinction since the only purpose of the hearing would be to "relitigate" the determination of the magistrate that probable cause did exist. Hence, we feel that the Bak and Mitchell decisions are applicable and that the motion was correctly denied.

The defendant next contends that the court improperly denied his motion for a continuance on October 28, the date the cause had previously been set for trial. On September 25, the defendant filed his motion for a list of witnesses and bill of particulars pursuant to section 114 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, sec. 114-9 and 114-2) along with three other pre-trial motions. On October 19, the prosecution responded to those motions with a list of seven witnesses and their residence addresses and an answer to the motion for a bill of particulars. On October 26, an additional list of witnesses was filed with the names and addresses of two

other witnesses, both police officers, that had been omitted from the original list and an amended answer. On October 28, the defendant moved for a continuance for "a reasonable period of time" so that he might properly prepare his defense on the grounds that the information sought in the two motions had not been furnished to him until 4:50 P.M. on October 26.

A motion for continuance is a matter within the sound discretion of the trial court and will not be disturbed on review unless it appears that the discretion has been abused. *The People v. Latimer*, 35 Ill. 2d 178, 181; *The People v. Clark*, 9 Ill. 2d 46, 49; Ill. Rev. Stat. 1969 Ch. 38 sec.114-4 (e). "Before it can be said that such a motion has been improperly denied, it must appear that the refusal to grant additional time has in some manner embarrassed the accused in his defense and thereby prejudiced his rights." *The People v. Wilson*, 29 Ill. 2d 82, 92; *The People v. Solomon*, 24 Ill. 2d 586, 589.

The amended answer to the motion for a bill of particulars only recited that the information sought was already available to the defense (being the affidavits attached to the complaint for search warrant). We do not see how the failure to disclose this information to the defendant before October 26 could in any way prejudice his rights. There is, in addition, nothing to show that the defendant was in any manner embarrassed in the preparation of his defense because the names and addresses of the two police officers were not



available to him until 4:50 P.M. on October 26. Under the circumstances, we do not feel that the denial of the motion for a continuance could be considered an abuse of discretion by the trial court.

Lastly, the defendant contends that the court improperly denied his motion to produce reports, notes, memoranda and statements until after the testimony of the involved witnesses. In his motion for a bill of particulars, filed on September 25, the defendant asked the court to order the prosecution to produce "all records, transcripts, documents, reports, memoranda or statements, notations or recordings (tape or wire) relating to or summarizing the testimony given by any person to any law enforcement agency, the State's Attorney, or the Grand Jury, including statements of any and all law enforcement officers relative to charges made against the Defendant in the indictment in this case". On October 19, the state answered the motion and denied that they had any such documents but, as we have seen, filed an amended answer on October 23 and listed the summary of the interview with Philip Long and the affidavit of Viola, both previously furnished to the defense. On October 29, the defendant filed a verified petition to the effect that the state did in fact have such documents and asked for their production. The court denied the motion but did order the state to produce any such documents in their possession for purposes of impeachment.

That order was completely consistent with the now well-established law in Illinois that such statements or reports, if otherwise relevant

or competent, shall be delivered to the defendant for purposes of
impeachment. The People v. Cagle, 41 Ill. 2d 528,^{534,}/244 N.E. 2d 200,
202; The People v. Wolff, 19 Ill. 2d 318, 327; The People v. Moses,
11 Ill. 2d 84, 89. There is nothing to show that the statements and
reports were not delivered to the defense for impeachment purposes
as ordered by the court.

We therefore conclude that the judgment of the trial court was
proper and should be affirmed.

AFFIRMED.

SEIDENFELD, P. J., and GUILD, J., Concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable PHILLIP F. LOCKE, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

February 24, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE

ABSTRACT

APPELLATE COURT OF ILLINOIS

ONLY

SECOND DISTRICT

FILED 2-1-1972
 HOWARD K. KELLETT, Clerk
 Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS)	
	)	Appeal from Kane County
Plaintiff-Appellee)	
	)	Hon. Charles G. Seidel
-VS-	)	Judge presiding
)	
BRENT CLIFFORD BLAYDES)	
)	
Defendant-Appellant)	

JUSTICE PHILLIP F. LOCKE delivered the opinion of the court:

The defendant herein was charged with aiding and abetting the sale of marijuana. He was tried by a jury and sentenced to the penitentiary for a term of not less than 10 nor more than 15 years. At the time of the offense and the conviction, marijuana was classified as a narcotic drug under the provisions of par. 22-3 et seq. of ch. 38, Ill. Rev. Stat. 1969. This appeal is from the conviction and sentence.

In People v. Mc Cabe, 49 Ill.2d 338, 275 N.E.2d 407 (1971) the Illinois Supreme Court held that the classification of marijuana in the Narcotic Drug Act above cited, under which the defendant was convicted, was arbitrary and that such classification deprives the defendant of equal protection of the law. Such unconstitutional classification required reversal of the conviction. Petition for rehearing was denied in Mc Cabe on November 24, 1971.

In People v. Hudson, 276 N.E.2d 345, the Illinois Supreme Court considered the case of the defendant convicted of the unlawful sale of marijuana, as was the defendant here, and in relying upon Mc Cabe reversed the conviction. Such result is required in this case.

The judgment of the Circuit Court of Kane County is reversed and the mandate of this court is ordered to issue forthwith.

Judgment reversed.

MORAN, P. J.
GUILD, J.

Concur.

54716



43 I.A. 1026

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
EVERETT RHODES,)
)
Defendant-Appellant.)

Appeal from the Circuit
Court of Cook County.

Robert J. Downing, J.

ABST.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Everett Rhodes was indicted for the sale of a narcotic drug. The State reduced the charge—which, because of a prior conviction, carried a mandatory life sentence—to possession of narcotics and Rhodes pleaded guilty. Before accepting his plea, the trial court advised him that if he pled guilty he would waive his right to a jury, admonished him of the consequences of his plea and the sentence which could be imposed on him. Rhodes persisted in his plea. The guilty plea was accepted and the defendant was sentenced to the penitentiary for a term of two to five years, to run concurrently with a ten year sentence previously imposed by a Federal court.

The public defender, who was appointed to defend Rhodes on appeal, has filed a record, a brief and a motion in this court. The brief states that the only possible basis for the appeal would be whether the trial court adequately admonished the defendant as

to the significance and consequences of his plea of guilty, and concludes that the admonition was in full compliance with the requirements of the law. The motion requests leave to withdraw as the defendant's attorney.

This court notified Rhodes of the motion and gave him an opportunity to file any points he might have to support his appeal. He replied from the United States penitentiary at Leavenworth, Kansas, that two of his prior narcotic convictions should not have been brought to the court's attention in the mitigation and aggravation hearing because one of them was declared invalid and the second was about to be. He was asked to substantiate these assertions but, although we have waited several months, no response has been received from him.

We find no merit in this appeal. It cannot reasonably be argued that the defendant was not fully informed by the court and his counsel of his rights and the punishment fixed by law for his offense. An examination of the record discloses that nothing occurred at the trial that could be magnified into arguable error.

Normally, after reaching the conclusion that a record discloses no error, we would dismiss the appeal and affirm the judgment. There has arisen, however, an additional factor which must be taken into consideration. The narcotic drug which the defendant pleaded guilty to possessing was marijuana. Subsequent



to the filing of this appeal, the statutory classification of marijuana as a narcotic drug was declared to be unconstitutional. People v. McCabe, 49 Ill.2d 338, 275 N.E.2d 407 (1971). And it has been held that the McCabe case is to be applied retrospectively. People v. Hudson, 50 Ill.2d 1, 276 N.E.2d 345 (1971). The conviction of the defendant, therefore, must be reversed.

Judgment reversed.

McGlooin, PJ., and McNamara, J., concur.

